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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 TIFFANY AND COMPANY, et al,

4 Plaintiffs,

5 v.

13 CV 1041 (LTS)

6 COSTCO WHOLESALE CORPORATION,

7 Defendant.

8 -----x
9 New York, N.Y.
September 22, 2016
10 9:05 a.m.

11 Before:

12 HON. LAURA TAYLOR SWAIN,

District Judge

13 APPEARANCES

14 BROWNE GEORGE ROSS LLP
15 Attorneys for Plaintiffs
JEFFREY A. MITCHELL, ESQ.
16 JUDITH R. COHEN, ESQ.
BRETT D. KATZ, ESQ.

17 HUGHES HUBBARD
18 Attorneys for Defendant
JAMES W. DABNEY, ESQ.
19 RICHARD M. KOEHL, ESQ.
EMMA L. BARATTA, ESQ.
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Schutt - direct

1 (Trial resumed; jury not present)

2 THE CLERK: This case is Tiffany and Company et al. v.
3 Costco Wholesale Corporation.

4 THE COURT: Good morning, Mr. Mitchell, Ms. Cohen,
5 Ms. Abrams, Mr. Cole, and Ms. Schutt. And good morning,
6 Mr. Dabney, Ms. Baratta, Mr. Schutt, and Ms. Vogtman.

7 Do we have any issues that we need to address before
8 we start with the jury?

9 MR. MITCHELL: Not for the plaintiff, your Honor.

10 MR. DABNEY: Not for the defendant, your Honor.

11 THE COURT: Very well, then. The jury are not all
12 here yet. I just remind everybody that today is a short day.
13 We will end at 2. Lunch break at 12:30. We'll do the
14 ten-minute midmorning break sometime between 11 and 11:15. And
15 I will give you my usual ten minutes' heads up if we haven't
16 gotten to a stopping point.

17 Let's then wait for notice from Ms. Ng that the jurors
18 are ready. When they're ready she'll give us a two-minute
19 warning, and then we'll resume. Thank you very much.

20 (Recess)

21 THE COURT: Mr. Schutt, would you please return to the
22 witness stand. And Ms. Ng, would you please bring the jurors
23 in.

24 DOUGLAS WAYNE SCHUTT, Resumed.

25 (Jury present)

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1 THE COURT: Mr. Mitchell.

2 MR. MITCHELL: Thank you, your Honor.

3 DIRECT EXAMINATION (Cont'd)

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5 BY MR. MITCHELL:

6 Q. Good morning, Mr. Schutt.

7 A. Good morning.

8 Q. I was reading the transcript of your testimony from
9 yesterday last evening, and I want to come back to something
10 you said about what Mr. Dabney told the jury that was Costco
11 taking responsibility. This is the quote of what you said.
12 You said, quote, we respect the ruling of this Court, close
13 quote. Do you remember saying that?

14 A. Yes, sir.

15 Q. What did you mean by that?

16 A. I meant that we, we respected the, the ruling of Judge
17 Swain relative to this case.

18 Q. Can you be a little more detailed. I mean, to what extent?
19 You understand, she issued a ruling, and obviously that exists.
20 But how deep does that respect for the ruling go in terms of
21 how it's going to -- you understand what it means to take
22 responsibility. I just don't understand the objection.

23 (Mr. Dabney rose)

24 THE COURT: Is that an objection to form?

25 MR. DABNEY: Yes, your Honor.

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1 THE COURT: Sustained. Try again.

2 Q. Can you give a little more detail about what you mean by
3 that?

4 MR. DABNEY: Same objection, your Honor.

5 THE COURT: Would you two consult.

6 (Counsel confer)

7 Q. Let me ask you this. I'll rephrase the question. In
8 connection with respecting the ruling of the Court, does that
9 mean that Costco accepts, for purposes of this proceeding we're
10 in right now, that "Tiffany" as a standalone is a valid and
11 enforceable trademark?

12 A. Yes.

13 Q. And does that also mean that, sitting in the court right
14 now, that Costco concedes it had no right to use the Tiffany
15 trademark in signs as a standalone trademark?

16 A. Yes.

17 Does that also mean that Costco understands and
18 concedes that it is accountable to Tiffany for all profits it
19 made from sale of rings using the Tiffany trademark as a
20 standalone?

21 THE COURT: Please consult.

22 (Counsel confer)

23 Q. Your lawyer doesn't want me to ask that question. I'll
24 withdraw. OK?

25 THE COURT: The remark is stricken.

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1 MR. MITCHELL: I'm sorry.

2 THE COURT: Disregard the remark.

3 Q. So I'm clear, Costco still doesn't agree with the decision,
4 right?

5 MR. DABNEY: Your Honor, we --

6 THE COURT: Come to the sidebar, please.

7 (At the sidebar)

8 MR. MITCHELL: Your Honor, Mr. Dabney made a
9 representation to the jury in his opening that Costco accepts
10 responsibility for what happens here. I asked the witness
11 yesterday what he meant by that. And he said, we respect the
12 ruling of this Court. I was reading the transcript. And I
13 don't understand that evidence. I want to know to what extent
14 Costco has accepted responsibility now that counsel has made
15 that representation, and he's gone down that line of
16 questioning. Understanding the proceeding against Costco, why
17 they're here, this goes to the question of punitive damages:
18 what does Costco intend to do in the future? So to the extent,
19 at least in the well of this courtroom, that they respect the
20 ruling of this Court, then he should be able to explain to them
21 the extent to which they do for purposes this of this
22 proceeding. That was his answer. I'm only drilling down on
23 his answer. Obviously when he gives an answer I'm entitled to
24 drill down on that.

25 THE COURT: Mr. Dabney.

1 MR. DABNEY: Your Honor, this line of questioning is
2 why we objected to the use of the answer and counterclaim and
3 then the Second Circuit proceedings for the suggestion that a
4 litigant should have inferences drawn against it because it
5 filed pleadings or waived its legal rights or filed a motion in
6 appellate court, a practice we think is improper. For the
7 witness to say he respects the ruling of the Court is simply,
8 that's what he said. The line of questioning seems to be
9 asked, well, do you really respect the ruling of the Court and
10 are you waiving any rights you might have outside of the trial.
11 And I don't think that that is an appropriate line of
12 questioning for this witness. The issue here is, the facts
13 that they did before the lawsuit was filed, what did they
14 believe then, what did they do to stop the reality on the
15 ground. That's all fair game. To try to give indirectly what
16 they can't do directly, to argue with this witness about legal
17 pleadings in court and legal rights that Costco may or may not
18 have or have waived, I don't think, is relevant to any issue in
19 this case, and we would be asking for a strong corrective
20 instruction with regard to questions that have already been
21 asked with the insinuation that defendant, because Costco filed
22 a counterclaim and because Costco made a motion to the Second
23 Circuit, that that somehow means that Costco is a willful
24 infringer here. We don't think that that is the proper
25 argument at all.

1 THE COURT: Well, you opened the door on this issue
2 with your presentation in the opening that Costco accepts
3 responsibility and either explicitly or by implication that the
4 issues here are no big deal and at most about a small amount of
5 money. There are issues here with respect to what Costco's
6 intent is, whether there is a need to disincentivize further
7 intentional misuse of the trademark, and having led with that
8 proposition, we have an issue on Costco's -- whether there is a
9 change of heart or that's merely a different strategy in
10 relation to a particular claim that was filed and the court
11 decision and what the prospects are for a recurrence.

12 Having said that, there are legitimate questions of
13 waiver and the way that plaintiffs were questioning,
14 particularly the ending line, goes to that issue. And so if
15 this is a line of argument, then that's something for me to
16 manage in terms of getting an appropriate record but not one
17 that prejudices Costco's rights with respect to appeals.

18 So it is fair for you to ask him what the relationship
19 is in his mind between respecting the rulings of the Court and
20 accepting responsibility and at what point was it his
21 understanding that using "Tiffany" as a standalone is wrong.
22 And if you want to go over that later in your closings, fine.
23 But I am instructing you to stay away from leading on actual
24 legal positions and --

25 MR. MITCHELL: My original question was a totally

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1 open-ended question, which was, what did you mean. And I was
2 just saying, I didn't understand, can you explain more, and
3 that's why I started to be more specific.

4 THE COURT: It ended up being very meandering and
5 confusing, so what you want to get is the relationship between
6 accepting responsibility and respecting the ruling of the
7 Court.

8 MR. MITCHELL: I will ask that question.

9 THE COURT: I'll allow that.

10 MR. DABNEY: Thank you.

11 (Continued on next page)

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1 (In open court; jury present)

2 Q. Mr. Schutt, would you please state to the jury if you can
3 the relationship between accepting responsibility and
4 respecting the ruling of the Court. Can you explain how those
5 two go together.

6 A. Well, sure. And I'm proud to be part of a company that has
7 a code of ethics that in the first line it says we obey the
8 law. And we obey the law in everything that we do.

9 The Court has made a ruling. We respect that. And I
10 am here personally to be part of the resolution. If anybody
11 was harmed in any way, we want to make sure that we do the
12 right thing.

13 Q. And you accept the ruling of the Court that Tiffany as a
14 standalone trademark is not generic.

15 A. Yes.

16 Q. OK. Now, Mr. Schutt, as part of your job responsibilities
17 as the head of merchandising, certainly for the United States,
18 I presume you visited Costco stores regularly?

19 A. Yes.

20 Q. About how many times, could you -- thousands of times?

21 A. Over 30 years, I'd say probably a thousand, thousand times.

22 Q. And I assume on your way into every Costco store when you
23 walked in, there was a jewelry case near the entrance. Right?

24 A. Yes.

25 Q. You walked by it every time you walked in the store every

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1 one of those thousands of times, right?

2 A. Yes.

3 Q. So over the course of those thousands of visits to the
4 Costco stores, there must have been occasions where you looked
5 in the jewelry case on the way into the store, right?

6 A. Sure.

7 Q. So there also must have been occasions when you looked into
8 the jewelry case where you saw signs that had "Tiffany" on
9 them, right?

10 A. I can't recall ever seeing a specific sign with, with
11 "Tiffany" on it.

12 Q. You looked in the case, so either you saw it or it never
13 made a mental impression on you, right?

14 A. It could have been there. I might not have noticed it.
15 I'm looking at a lot of things when I, when I visit a location,
16 a lot of things in the case.

17 Q. So assuming you looked into one of these jewelry cases
18 during a time when a Tiffany sign was there, it didn't cause
19 you to react in any way to question whether that was an
20 appropriate way to put a sign next to a ring. Right?

21 A. Could you re-- could you clarify that question for me?

22 Q. You're walking by the jewelry case. You look in. There's
23 a Tiffany sign there. It didn't bite. So you didn't do
24 anything about it even if you saw it. Right?

25 THE COURT: Please consult.

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Schutt - direct

1 MR. MITCHELL: I'll withdraw. Let me rephrase the
2 question.

3 Q. How long was the word "Tiffany" in signs in the jewelry
4 case at Costco?

5 A. Well, since this all came up, I've had an opportunity to
6 look into this, and, and the word "Tiffany" or "Tiffany set" or
7 "setting" has been used for quite a long time.

8 Q. Give me an idea of "quite a long time." Ten years?

9 A. I think longer than that.

10 Q. 20 years?

11 A. I'd say 20 years.

12 Q. OK. And we know that the phrase "solitaire Tiffany"
13 appeared in signage at least as far back as 2007, right?

14 A. Yes.

15 Q. So you're in the store thousands of times. You walk past
16 the jewelry case. It's fair to assume that, at least on one
17 occasion in those thousands of times, there had to be a sign in
18 one of the cases that said "Tiffany," right? Can't we assume
19 that?

20 THE COURT: Please consult.

21 (Counsel confer)

22 MR. MITCHELL: I withdraw the question.

23 Q. It's fair to say, Mr. Schutt, that in your tenure as the
24 head of merchandising, you never raised any issue about the use
25 of "Tiffany" in signage of Costco, correct?

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Schutt - direct

1 A. I never had the opportunity to, to raise that.

2 Q. That was a yes or no, Mr. Schutt. Yes or no. You never
3 raised an issue about it.

4 A. No.

5 Q. OK. And jewelry is within your -- you delineated all the
6 things you weren't responsible for, but jewelry was within your
7 area of responsibility, right?

8 A. Yes.

9 Q. And you looked in the jewelry case on a regular basis when
10 you visited the stores, right?

11 A. Of course.

12 Q. Now, I think you said yesterday that as part of taking
13 responsibility, that Costco took the signs down right away.
14 Right?

15 A. That's correct.

16 Q. And it was your belief, wasn't it, Mr. Schutt, that that
17 should have been enough, right? For Tiffany.

18 A. I don't know about Tiffany, but I do know that, in addition
19 to taking the signs down, we put a block in the system so that
20 the word "Tiffany" could never ever be, be used again.

21 Q. So from your perspective, at the time the head of
22 merchandising, this was not such a big deal, take the signs
23 down, that should be the end of it. Right?

24 A. Well, that was part of, you know, accepting responsibility,
25 and of course there's more to, to that.

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Schutt - direct

1 Q. But from your perspective, you felt that should have ended
2 it with Tiffany, right? Tiffany should have been satisfied
3 with that and it was finished.

4 A. Sure, yeah. It...

5 Q. OK. So since we know there were signs in the display case
6 at Costco with standalone uses of "Tiffany" at least as far
7 back as 2007, your testimony is that you never raised that as
8 an issue with anyone, right?

9 A. The use of "Tiffany," since I had not seen it, I had no
10 reason to raise it as an issue, in my visits.

11 Q. Well, you don't know if you saw it or you didn't see it.
12 You just don't remember if you saw it, right?

13 A. I don't recall seeing a Tiffany sign. I do know now, after
14 seeing photos and researching that, of course, it was in our
15 cases at some point.

16 Q. Is it fair to say since it was in the case, you at least
17 concede you may have seen it, you just may not remember that
18 you saw it. Is that fair?

19 A. OK.

20 Q. So when you said yesterday to this jury -- I asked, who's
21 taking responsibility since this is merchandise, and you said
22 you were taking responsibility. You were the, you know -- I
23 even asked you about Harry Truman, right, the buck stops with
24 you, right?

25 A. That's right.

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Schutt - direct

1 Q. So you also were within physical proximity to these signs
2 many, many times in the jewelry case at Costco during the
3 period of time that standalone usage of "Tiffany" was being
4 made in the jewelry case, right?

5 A. OK.

6 Q. So this idea that, I think you used the phrase yesterday
7 "sign maintenance management failure," is that what you called
8 it or --

9 A. I called it an issue.

10 Q. "Sign maintenance management issue," OK. And that made it
11 sound like Costco didn't properly manage junior-level employees
12 from the senior management level. Correct?

13 A. I take responsibility for that.

14 Q. Right. So what you mean by that is, if I understand you
15 correctly, that from a senior management level, the junior
16 employees were putting words on signs that you're now not
17 letting them do because you've tightened your control, right?

18 A. Yes.

19 Q. But you are senior, you are about as senior management as
20 there could be, right, in Costco?

21 A. Yes.

22 Q. And you're in the stores all the time, and you're not even
23 noticing the signage as you come into the store. Right?

24 A. I notice a lot of things about a lot of signs when I visit
25 locations.

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Schutt - direct

1 Q. So isn't this -- you said you noticed a lot of things about
2 a lot of signs?

3 A. Sure.

4 Q. So you looked at signs. That's part of what you did when
5 you walked in the store.

6 A. Signs are very important in our relationship with our
7 customer, because that's what they read when they are looking
8 at a product.

9 Q. Signs are important.

10 A. Yes.

11 Q. Signs are very important to Costco.

12 A. Of course.

13 Q. Because you don't price your products individually, right?

14 A. That's correct.

15 Q. You use the signs to describe the products you sell.

16 A. Yes.

17 Q. And that's the only place there's a product description at
18 Costco that's written by Costco, right, on those white signs?

19 A. Yes.

20 Q. So it sounds like besides there being a sign maintenance
21 management issue, there is also a senior management issue
22 concerning signs; would you agree with that?

23 A. We have certain protocols that we have put in place that
24 we've used the 30 years I'm with the company, and, you know,
25 we, if we have an issue with a protocol, we, we work to change

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Schutt - direct

1 that as fast as we can. So, yeah, if a mistake is made,
2 ultimately I take responsibility for that, for that sign.

3 Q. I'm trying to distinguish that between, like I said, the
4 Harry Truman, the buck stops here, and Mr. Schutt who is
5 actually on the floor of Costco looking at these signs and not
6 doing anything about it. These signs were there. They existed
7 in physical form. And they were in the jewelry case. Yet at
8 no time during all of these thousands of visits was there ever
9 any report from you that somebody should look into the
10 propriety of these signs. That's my question to you. That's
11 correct, that never happened, right?

12 A. We never thought that there was an issue with, with the use
13 of "Tiffany" in our signage. It never was an issue over, you
14 know, 20 years.

15 Q. Thank you. So you didn't think there was an issue, which
16 indicates that you were doing it on purpose: we were putting
17 "Tiffany" in the signs in that way on purpose. Right?

18 A. Well, I do know that, you know, since, you know, this came
19 up three years ago, that I could trace back and see what
20 occurred here, the abbreviation that was made. That was the
21 sign maintenance management issue. Abbreviation was made. And
22 I had the opportunity to talk to individuals who were involved
23 with this situation. And I've looked at sign maintenance
24 records. So I know how this management issue happened.

25 Q. Mr. Schutt, Mr. Dabney told the jury the sign said

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Schutt - direct

1 "setting," then said "set," and then some low-level person at
2 Costco, thousands of levels below you, made some incorrect
3 decision to remove "set" from signage. You heard that?

4 A. Yes.

5 Q. OK. But the evidence is, Mr. Schutt, that Costco is using
6 a sign variation that said "solitaire Tiffany" without "set,"
7 "setting," or any other modifier as early as 2007. Right?

8 A. OK.

9 Q. So that whole statement that you make about removing
10 wording from signs, these signs didn't have "set" as early as
11 2007, and for all we know go back 20 years, right?

12 A. I do know that they are --

13 Q. It's a yes or no, Mr. Schutt.

14 A. Could you please ask the question.

15 Q. I said, you understand that the "solitaire Tiffany"
16 designation on a sign, which is a standalone, existed on the
17 floor of Costco since 2007. Right?

18 A. Yes.

19 Q. There's no removal of "setting" or "set" from that, right?

20 A. No.

21 Q. OK. So the whole "set," "setting" story really is a side
22 issue; it's not the main point here. You understand that?

23 A. Yes.

24 Q. So I keep going back to it. I don't understand why you
25 keep raising it. If you answer my questions either yes or no,

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1 I think we could probably save a little time, because that was
2 not what I was asking you. You know that. So please try to
3 answer my questions.

4 Mr. Dabney said in his opening, he corrected me -- I
5 had said in my opening that Costco has 70 million members, and
6 he said, oh, no, no, much more popular than that, 85 million
7 members. Is that right?

8 A. Yes.

9 Q. So it goes without saying, with that many members, that
10 there must be some Tiffany shoppers who also are Costco
11 members, right?

12 A. Oh, I think so, yeah.

13 Q. Yeah. And you wouldn't exclude Tiffany customers from
14 membership with Costco, right?

15 A. Of course not.

16 Q. And even you are a Tiffany customer, aren't you?

17 A. I have bought Tiffany products, my wife has, yes.

18 Q. And I believe you said earlier that Costco has about 3
19 million shoppers a day that walk through stores. Is that about
20 right?

21 A. Yes.

22 Q. 3 million shoppers a day. Right?

23 A. Yes again.

24 Q. So what about the impression left on Costco members who,
25 like you, also shop at Tiffany, weren't interested in buying

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Schutt - direct

1 jewelry, but happened to look into the jewelry case and saw
2 this standalone usage of "Tiffany"? Wouldn't they have the
3 impression that Costco is selling actual Tiffany merchandise?

4 THE COURT: Please consult.

5 MR. MITCHELL: I'll rephrase the question.

6 Q. You would concede to me, Mr. Schutt, would you not, that
7 when you looked into the jewelry case and saw the ring in its
8 holder, there was no visibility to any markings inside the
9 ring; all you saw was the diamond in the top of the ring
10 itself, right?

11 A. Yes.

12 Q. And if a sign said "Tiffany" next to it, to describe that
13 ring, there was nothing in the case that said, either, this is
14 not a real Tiffany ring, or, this is a Kirkland Signature ring,
15 which is your brand. Right?

16 A. Yes.

17 Q. Yes, it did not say that, right?

18 When you say "yes," I said there was something in
19 there that said you suggested that. I just want to make sure
20 we're clear. Right?

21 A. Yes.

22 Q. So anyone walking past the case, looking into the case, all
23 they would see is the sign that described the product and the
24 product itself. Right?

25 A. Yes.

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Schutt - direct

1 Q. And that was visible to Tiffany customers who are Costco
2 members as well, right?

3 A. Yeah.

4 Q. Yes?

5 A. Yes.

6 Q. So I want to just, before I turn to something else, just
7 finish up this area. Taking responsibility and changing your
8 conduct after you're caught, would you agree with me that those
9 are two different things?

10 A. Yeah.

11 Q. OK. So what really happened here was Costco finally got
12 caught by photographic evidence, using signs in its jewelry
13 case that use "Tiffany" on a standalone basis. Correct?

14 A. We now know that was being used as a standalone, yes.

15 Q. So it's fair to say that once Costco was put on notice that
16 Tiffany had an investigator who observed this conduct at the
17 Huntington Beach store, that Costco would take action to
18 prepare itself for the possibility of a lawsuit. Right?

19 A. Uh, OK.

20 Q. OK. So one of the things you might do to prepare yourself
21 for a lawsuit is to change your conduct so that things don't
22 quite look as bad as they may appear. Would you agree with
23 that?

24 A. Could -- that question isn't clear to me. Could you, you
25 say that again, please.

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Schutt - direct

1 Q. Costco is a big sophisticated company, right?

2 A. OK.

3 Q. You hire, you know, you hire lawyers to represent you. You
4 understand the legal system and lawsuits. Right?

5 A. Sure.

6 Q. So when you're put on notice of a possible lawsuit, the
7 company does things to prepare itself for a possible claim.
8 Right?

9 A. Sure.

10 Q. And one of those things might be to modify conduct because
11 it will look better in the lawsuit later unless they don't do
12 that. Right?

13 A. I can't speak to that.

14 Q. You would agree with me, though, that changing your
15 internal practices and becoming more vigilant after you're
16 caught is not the same thing as being vigilant on something you
17 should have been vigilant for already and when you catch a
18 problem, being a standup company and accountable, before
19 there's a lawsuit, right?

20 A. I think we had an oversight issue and it needed to be
21 corrected.

22 Q. I will move on to something else. I want to turn to Costco
membership if we can. Mr. Cole, can you pull up DTX 19.

23 I need to hand you up a book. I'm sorry.

MR. MITCHELL: May I hand it up, your Honor?

24 THE COURT: You may.

THE WITNESS: Thank you.

25 (Continued on next page)

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Schutt - direct

1 Q. Turn in your book, please, to page PTX19. Are you there?

2 A. Yes, sir.

3 Q. Okay. Do you recognize what PTX19 is?

4 A. Yes.

5 Q. Fair to say it's a printout from the Costco website?

6 A. Yes.

7 Q. And is this a page on your website which explains to people
8 considering membership why they should become a member of
9 Costco?

10 A. Yes.

11 MR. MITCHELL: I offer PTX19 as Plaintiff's Exhibit
12 19.

13 MR. DABNEY: No objection.

14 THE COURT: Plaintiff's Exhibit 19 is admitted and may
15 be displayed.

16 (Plaintiff's Exhibit 19 received in evidence)

17 THE COURT: Just to make sure the projection system is
18 working, would you just put your hand on the ELMO? Actually,
19 the screens are, the screen is dark. We're calling the AV
20 department. The AV department are coming now. We can take a
21 break for a few minutes -- I'm sorry -- we tried the screen
22 from the ELMO and all the screens are black. All your screens
23 are black? There seems to be a problem with the main feed. So
24 we can either use paper for the examination and publish to the
25 jury or we can take a break of ten minutes and hope that our AV

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Schutt - direct

1 people can get this going. I wish I knew what the problem was
2 but I don't, that's why I called the AV people.

3 MR. MITCHELL: I would prefer the latter so the jurors
4 could follow. We prepared this in a way that the jurors could
5 follow.

6 THE COURT: All right, so ladies and gentlemen, we'll
7 ask Ms. Ng to escort you back into the jury room and continue
8 to keep your thoughts to yourselves and don't go far because
9 we'll call you back out as soon as we get it fixed. Thank you.

10 (Jury exits)

11 (Continued on next page)

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Schutt - direct

1 (In open court; jury not present)

2 THE COURT: Please be seated, everyone. Now, I do
3 hope this is something simple. Here are our AV experts, so
4 let's hope we can get this fixed, but one thing I was going to
5 tell counsel, assuming the system can be revived is to let you
6 know or remind you that when the system is working it does have
7 a facility for displaying to the witness and counsel and Court
8 only and not to the jury, and so that is one way you can show a
9 document for authentication purposes and then once it's
10 admitted we can change the feed to show the jury and everybody
11 else. So --

12 MR. DABNEY: Thank you, your Honor.

13 THE COURT: I'll let you know this.

14 MR. MITCHELL: I'll stick with this formula because
15 I'm used to it, but --

16 THE COURT: Of course the screens have to show
17 something and that's what we're working on now.

18 (Recess)

19 THE COURT: Mr. Schutt, if you could come back to the
20 witness stand, everybody else be seated, and I understand the
21 machines are working. I apologize for the inconvenience.
22 Ms. Ng, please bring the jury in.

23 (Continued on next page)

24

25

1 (In open court; jury present)

2 THE COURT: Welcome back, ladies and gentlemen of the
3 jury. We've addressed our technical difficulties. Please take
4 your seats in the jury box. Everyone else, please be seated.

5 MR. MITCHELL: Mr. Cole, please put on the screen,
6 Plaintiff's Exhibit 19.

7 Q. So, Mr. Schutt, what's now been displayed on the monitor,
8 this is the web page maintained by Costco. It explains, it
9 says why become a member, right?

10 A. Yes.

11 Q. This is Costco's official explanation to the public of why
12 these 85 million people should become members of Costco, right?

13 A. Correct.

14 Q. I want to focus in on this paragraph. "What is Costco?"
15 It says, quote, "We are a membership warehouse club dedicated
16 to bringing our members the best possible prices on quality
17 brand name merchandise." That's an accurate statement, right?

18 A. Yes.

19 Q. So Costco is famous for not only carrying brand-name
20 products but at low prices, right?

21 A. Yes.

22 Q. Yes?

23 A. Yes.

24 Q. And a lot of what Costco sells are famous brand-name
25 products, right, famous brands?

G9FMTIF2

Schutt - direct

1 A. Yes.

2 Q. Brands we've all heard of; Coke, Charmin, you name it. All
3 the products, products we hear every day, Costco sells them?

4 A. Yes.

5 Q. Now, Costco has also created and developed its own brand,
6 right?

7 A. Yes.

8 Q. It's called Kirkland Signature, isn't it?

9 A. Yes.

10 Q. And Kirkland Signature products are offered alongside
11 brand-name products for the same product category, right?

12 A. Yes.

13 Q. And the idea of Kirkland Signature products is you can get
14 something as good as, if not better than a famous brand at an
15 even lower price if it's Kirkland Signature, right?

16 A. Yes.

17 Q. So I'm going to tick off some products and tell me if you
18 agree that these products are sold at Costco under the Kirkland
19 Signature brand. Wine?

20 A. Yes.

21 Q. Eyeglasses?

22 A. Yes.

23 Q. Hearing aids?

24 A. Yes.

25 Q. Clothing?

G9FMTIF2

Schutt - direct

1 A. Yes.

2 Q. Toiletries?

3 A. Yes.

4 Q. Paper goods?

5 A. Yes.

6 Q. Food products?

7 A. Yes.

8 Q. Over-the-counter drugs?

9 A. Yes.

10 Q. Okay. And that's just a short list. There's even more,
11 right?

12 A. Yes.

13 Q. Okay. Take a look, if you would, at PTX32. That is --
14 first of all, is there a publication called the Kirkland
15 Signature Wine Connection?

16 A. We have a magazine that we publish that's called "The
17 Connection".

18 Q. So is this a photograph of a page from the Kirkland
19 Signature Connection?

20 A. Yes.

21 MR. MITCHELL: I'll offer Plaintiff's Exhibit 41.

22 MR. DABNEY: No objection.

23 THE COURT: I'm sorry, you said 41? 32?

24 MR. MITCHELL: I'm sorry, wrong number, that was the
25 deposition number. 32, PTX32.

G9FMTIF2

Schutt - direct

1 THE COURT: Plaintiff's Exhibit 32 is admitted and may
2 be displayed.

3 (Plaintiff's Exhibit 32 received in evidence)

4 Q. So Plaintiff's Exhibit 32 is a photograph of a bottle of
5 wine labeled Kirkland Signature, right?

6 A. Yes.

7 Q. And this is the way you label the wine, it clearly says
8 "Kirkland Signature" on the wine bottle, right, the wine label?

9 A. Yes.

10 Q. Could you take a look at PTX33, please? It's a photograph
11 of Kirkland Signature eyeglasses, right? If you look at the
12 stem you'll see the word there?

13 A. Yes.

14 MR. MITCHELL: I'll offer PTX33 as Plaintiff's Exhibit
15 33.

16 MR. DABNEY: No objection.

17 THE COURT: PTX33 is admitted in evidence and may be
18 displayed.

19 (Plaintiff's Exhibit 33 received in evidence)

20 Q. And if I circle right here, this is where it says "Kirkland
21 Signature" on the stem of the eyeglasses, correct?

22 A. Yes.

23 Q. So the product is clearly marked that it's a Kirkland
24 Signature product, right?

25 A. Yes.

G9FMTIF2

Schutt - direct

1 Q. Take a look at PTX34, if you would. It's a paragraph of an
2 eyeglass case, right?

3 A. Yes, it is.

4 MR. MITCHELL: I offer PTX34.

5 MR. DABNEY: No objection.

6 THE COURT: Plaintiff's Exhibit 34 is admitted and may
7 be displayed.

8 (Plaintiff's Exhibit 34 received in evidence)

9 Q. This is the case that the eyeglasses come in, clearly
10 marked "Kirkland Signature" on the case, right?

11 A. Yes.

12 Q. In fact, isn't it true that there's almost nothing that
13 Costco sells -- let me ask a preliminary question first. These
14 products, these Kirkland Signature products are often made by
15 outside vendors to Costco specifications, right?

16 A. Yes.

17 Q. So you communicate with the vendor about what you want, the
18 vendor makes the product for you and delivers it with the
19 Kirkland Signature name on it, correct?

20 A. Yes.

21 Q. So you -- there's another product. I mentioned in my
22 opening Tylenol and Advil, did you hear that?

23 A. Yes.

24 Q. Costco also makes painkillers or has painkillers made for
25 it by an outside vendor, right?

G9FMTIF2

Schutt - direct

1 A. Yes.

2 Q. So you know acetaminophen is in Tylenol, right?

3 A. Yes.

4 Q. And ibuprofen is the active ingredient in Advil?

5 A. Yes.

6 Q. The over-the-counter painkiller that Costco makes with

7 ibuprofen or acetaminophen, you'd label that Kirkland

8 Signature, correct?

9 A. Yes.

10 Q. Defendant's Exhibit 19, which is the box in which the rings
11 at issue in this case came, has no markings at all, right?

12 Nothing. Do you want me to hand it to you?

13 A. No. I'm familiar with that box. It's a generic box.

14 Q. Generic box. Totally blank, right?

15 A. Yes.

16 Q. No brand name on the inside or the outside, right?

17 A. Correct.

18 Q. And the inner box, this inner box here also plain.

19 A. Yes.

20 Q. Right?

21 A. Yes.

22 Q. You don't even put "Costco" or "Kirkland Signature" on the
23 inside part of the box, right?

24 A. No.

25 Q. So unlike eyeglasses, hearing aids, over-the-counter

G9FMTIF2

Schutt - direct

1 medications, paper products, these rings came in plain
2 packaging with no branding on them whatsoever, right?

3 A. Yes.

4 Q. So the only place that a brand name appeared in connection
5 with these rings was on the signs that had Tiffany being used
6 as a standalone in the jewelry case, correct?

7 A. Just clarify for me. When you say "these rings," could you
8 clarify?

9 Q. We're talking about in this case about the standalone use
10 of "Tiffany" in signage next to rings, right?

11 A. Yes.

12 Q. So we already saw photographs of the rings, there was no
13 Costco signature even printed on the inside of the ring?

14 A. On the pictures we looked at yesterday? Yes.

15 Q. Yes, there was no brand on those rings? You didn't put
16 Kirkland Signature on them?

17 A. No, there's just the manufacturer's emblem or trademark.

18 Q. Didn't say Kirkland Signature?

19 A. It did not.

20 Q. Okay. And these vendors, like all your other vendors who
21 make Kirkland Signature products, could have put Kirkland
22 Signature on this product had you asked them to do it, correct?

23 A. We don't have Kirkland Signature branded jewelry, but I
24 think our vendors if we asked them, they would do it.

25 Q. Right, they would do it. Why wouldn't they? You could

G9FMTIF2

Schutt - direct

1 also put Kirkland Signature on your boxes, right?

2 A. Sure.

3 Q. But nobody really wants to get a Kirkland Signature
4 engagement ring probably. That's probably why you don't do it,
5 right?

6 A. No.

7 Q. And this Kirkland Signature brand that you have is now a
8 pretty big brand, right?

9 A. Yes.

10 Q. \$15 billion a year, is that right?

11 A. No, you're way off.

12 Q. Is it even bigger?

13 A. Oh, yes.

14 Q. Even bigger than 15 billion a year. How big is it?

15 A. I think this past fiscal year our sales on a Kirkland
16 Signature product exceeded \$32 billion, not including the
17 gasoline, which we put our name on the gasoline.

18 Q. So you have created within the four walls of Costco on this
19 model of selling memberships in order to sell branded products
20 at a discount, you've also on the back of that built this giant
21 branded house brand, Kirkland Signature, right?

22 A. Yes.

23 Q. So the growth of Kirkland Signature, which is now over
24 \$30 billion, owes a lot to branded products that you also sell
25 at Costco at a discount, right?

G9FMTIF2

Schutt - direct

1 A. It many times allows us to have a price comparison with the
2 leading national brand, yes.

3 Q. Right. And if you just opened Costco at the beginning, you
4 filled it with Kirkland Signature products, nobody would have
5 known what it was, right?

6 A. Hmm, no.

7 Q. It took years to build that brand, right?

8 A. It started in 1995.

9 Q. Now, if you would turn to tab 14 --

10 MR. MITCHELL: Your Honor, did I offer Plaintiff's
11 Exhibit 34?

12 THE COURT: Yes. That was admitted.

13 Q. Let's turn to PTX14 in your book. And, Mr. Schutt, this is
14 Plaintiff's Exhibit 14 which is in evidence and if you would,
15 would you please turn to the page Bates stamped 14.0014.

16 THE COURT: Do you have an objection or desire to
17 consult?

18 MR. DABNEY: Yes, your Honor.

19 THE COURT: Would you please consult? It's helpful if
20 you just say "objection."

21 Q. I'm sorry, could you go to 15. PTX14.0015. This is a page
22 from Plaintiff's Exhibit 14.

23 MR. MITCHELL: Mr. Cole, can you please blow that
24 paragraph up?

25 Q. Now, this is a section of your 2012 annual report which is

G9FMTIF2

Schutt - direct

1 the year in which this -- right around the time that this
2 dispute arose, and you said in your publicly filed annual
3 report, "We rely on trademark and copyright laws, trade secret
4 protection and confidentiality and license agreements with our
5 suppliers, employees and others to protect our proprietary
6 rights."

7 You, Costco as a company, made a public statement that
8 when it comes to the Kirkland Signature brand that it takes
9 action to protect its own trademark rights, correct?

10 A. Of course.

11 Q. So when it comes to Costco, if somebody improperly uses
12 your trademark Kirkland Signature you will take action against
13 those people, that's the purpose of that statement, right?

14 A. Sure.

15 Q. Do you have a standard markup for Kirkland Signature
16 products?

17 A. We put a limit on how high a buyer could, or we would
18 approve as an initial markup, which is referred to as our IMU,
19 yes.

20 Q. And what is the, markup is the difference between what you
21 pay for a product and what you sell it for?

22 A. Including all the costs included with -- transportation,
23 manufacturing and packaging all that kind of thing. That all
24 rolls up into the net landed cost of the product and then our
25 sell price off that will give it your initial markup, which is

G9FMTIF2

Schutt - direct

1 your IMU.

2 Q. On a percentage basis, on a percentage basis, so it doesn't
3 need to be a speech, just the percentage, what is the standard
4 percentage that you mark up Kirkland Signature product?

5 A. No more than 15 percent.

6 Q. Is that markup different than the markup you use for
7 jewelry?

8 A. That ceiling is different because --

9 Q. Just the question. Is it different? I can follow up if I
10 want to follow up. Is there a different markup on jewelry?

11 A. Yes.

12 Q. And what is, if you know, the average standard markup for
13 jewelry products?

14 A. I do not know the standard markup because it varies by
15 item.

16 Q. Do you dispute Mr. Kaczmarek's testimony yesterday that
17 Costco generally marks up its jewelry products about
18 13 percent?

19 A. That's not accurate.

20 Q. It's not accurate.

21 A. Not accurate.

22 Q. Is it close? I mean, if we were talking about multibillion
23 dollar companies here, are we off by 10 percent, 20 percent or
24 like 1 percent?

25 A. He's off by about 200 basis points, so I think our average

G9FMTIF2

Schutt - direct

1 gross margin on our product is roughly 10-1/2, 11 percent,
2 somewhere in there.

3 Q. So he said 13 and you're saying 10-1/2, 11.

4 A. Approximately, yes.

5 Q. Now, Mr. Kaczmarek also said that the markup at Costco is
6 less than what you would find in a normal retail store. Do you
7 agree with that?

8 A. Yes.

9 Q. And do you know what the standard or ordinary markup is in
10 an ordinary jewelry store that doesn't charge members, that's
11 just in a shopping center, street store? Do you have any idea?

12 A. Roughly.

13 Q. What would that percentage be?

14 A. I would say probably in the 50 percent to 100 percent
15 markup range.

16 Q. So the jury understands that distinction, if I buy a
17 product for \$10 -- let's say it costs me \$10 to put a product
18 on my shelves, how much would I be selling it for if the
19 product had a 50 percent markup?

20 A. Did you say \$10?

21 Q. \$10.

22 A. So a 50 percent markup would be half of that, so it would
23 be a \$5 gross margin dollar amount, that's how you get the
24 50 percent.

25 Q. That's a 50 percent?

G9FMTIF2

Schutt - direct

1 A. Yes.

2 Q. So in that circumstance, in a 50 percent markup, the
3 product I paid \$10 to acquire would be sold in my store for
4 \$15, correct?

5 A. Yes.

6 Q. And my profit over the cost of the goods is \$5?

7 A. Yes.

8 Q. You said sometimes it's a hundred percent. If I buy that
9 product and sell it on my shelves for \$10, what's the sale
10 price for that product in the store?

11 A. That would be a hundred percent markup, which would be \$20.

12 Q. So that would be \$10 profit on the acquisition cost of that
13 product?

14 A. Yes.

15 Q. And in the jewelry industry, the run-of-the-mill stores
16 that sell jewelry mark their products up between 50 and
17 100 percent?

18 A. That would be my estimation.

19 Q. Mr. Kaczmarek said that no ordinary retailer that doesn't
20 have membership fees to supplement its income, that it couldn't
21 survive on a 13 percent markup. Do you agree with that?

22 A. I don't know. It depends on if they are a low-cost
23 operator and manage their expenses it could be done.

24 Q. It would be pretty hard, right?

25 A. It's hard.

G9FMTIF2

Schutt - direct

1 Q. Your business model of charging the membership fee to stop
2 at your store is one of the things that enables you to charge
3 less of a markup on the individual products you sell, right?

4 A. Yes.

5 Q. Now, Costco stores in their physical appearance, for the
6 jurors who have never been in a Costco, these look like big,
7 giant warehouses, right?

8 A. They average 155,000 square feet in size.

9 Q. The typical look is a high, very high ceiling like a
10 warehouse, right?

11 A. Yes.

12 Q. An industrial enclosure with, you could see the beams,
13 cinderblock walls, things like that, right?

14 A. You bet.

15 Q. Concrete floors?

16 A. Absolutely.

17 Q. You have 30-foot metal shelving, right?

18 A. It's not 30 feet, but it's tall.

19 Q. Tall. You need a forklift to get products down from the
20 top, right?

21 A. And to put it up, sure.

22 Q. So even with the customers all walking around, you've got
23 people driving forklifts with pallets full of products, right?

24 A. Of course.

25 Q. And your business model as a general matter is that you

G9FMTIF2

Schutt - direct

1 sell products by the pallet full. I'm talking about you take
2 forklifts, they are filled, if I'm standing here they're
3 probably filled as high as five feet, and you put them beneath
4 the shelves and people take them and when they're empty you put
5 another pallet, right?

6 A. Yes.

7 Q. That's most of what you sell, right?

8 A. Selling product by the pallet?

9 Q. Yes.

10 A. Yes.

11 Q. Okay. And your business system is that you have giant
12 tractor trailer loads of those pallets of products delivered to
13 these warehouses and those pallet fulls of product are then put
14 on the warehouse floor, sold and you bring in another truck and
15 replace it, right?

16 A. Hopefully.

17 Q. Well, you do \$100 billion a year in sales, right?

18 A. More than that.

19 Q. More than that. How much more?

20 A. I think last year was roughly 120 something million --
21 billion, excuse me, in sales.

22 Q. So 120 billion? So your business -- obviously, this is the
23 heart of your business, right, selling large amounts of product
24 by the pallet full, right? That's the heart of the business.

25 A. Hopefully we have items that do that, yes.

G9FMTIF2

Schutt - direct

1 Q. Well you limit the number of items that you sell at any
2 given time, right? So of those you have about 3,000 standard
3 products, right?

4 A. It's actually 4,000.

5 Q. 4,000, but 3,000 are pretty much there all the time, right?

6 A. It's actually our SKU counts, which is our stock keeping
7 units, our average per warehouse is roughly 4,000 different
8 items, and that includes tires, apparel, meat.

9 Q. I assume because you're bringing in such giant a amount of
10 product it takes up a lot of space, that you keep track of
11 what's selling, right?

12 A. Of course.

13 Q. And if something is not selling it gets the boot.

14 A. Yes.

15 Q. So you're saying you hope to sell that amount of product
16 but you're watching it closely to make sure that if you're
17 devoting floor space in your giant warehouse to pallets of
18 product that that product is moving.

19 A. Okay.

20 Q. Yes?

21 A. Yes.

22 Q. Costco is not in the business of keeping stale merchandise
23 around?

24 A. Any business. Of course Costco is not.

25 Q. Isn't it true that in many ways Costco is just like a super

G9FMTIF2

Schutt - direct

1 supermarket? A lot of the products you sell are also in
2 supermarkets but in smaller quantities, right?

3 A. Yes.

4 Q. And most of the floor space in a Costco is devoted to
5 household items, food products, the kinds of things you would
6 ordinarily go to a supermarket for, right?

7 A. Oh, I'd say about 60 percent is food, sundries and fresh
8 and then the other 40 percent roughly is what we refer to as
9 non-foods products.

10 Q. But now supermarkets also have pharmaceutical and sundries
11 areas. You have that too, right?

12 A. Of course.

13 Q. And then a portion of your floor space is devoted to other
14 things; computers, televisions, GPS devices, jewelry among
15 them, right?

16 A. Yes.

17 Q. Would you turn in your book to the page stamped PTX29. If
18 you flip through PTX29 you'll see photographs of some signs.
19 Could you identify those as being signs generated at Costco?

20 A. Sure. I want to make sure I'm looking at the right thing.
21 On the first page here I have Sony as the first thing on that
22 sign.

23 Q. Yes.

24 A. Yes.

25 MR. MITCHELL: I'd offer PTX29.

G9FMTIF2

Schutt - direct

1 MR. DABNEY: No objection.

2 THE COURT: PTX29 is admitted in evidence and may be
3 displayed.

4 (Plaintiff's Exhibit 29 received in evidence)

5 MR. MITCHELL: Mr. Cole, can you just flip through
6 that for the jurors?

7 Q. So Costco uses these little white cards in varying sizes,
8 depending upon the location so you can seed them, throughout
9 its warehouses to display what it's selling and what the price
10 of it is, right?

11 A. Yes.

12 Q. And virtually every one of these signs in one form or
13 another has a brand name on it, right?

14 A. Yeah. All of them have a brand name as the first word on
15 the top line, yes, that I see so far here.

16 Q. I know you want to make that point. My question was
17 simpler than that. They all have a brand name on them,
18 correct?

19 A. Yes.

20 Q. And all Costco members know that the little white signs
21 identify the products that you're selling by brand and price,
22 right?

23 A. They've been trained over the last 34 years to do that,
24 yes.

25 Q. You don't train them in how you write your signs; they know

G9FMTIF2

Schutt - direct

1 the white signs are there, right?

2 A. Of course.

3 Q. There's no training manual that you send to your customers
4 when they become your customer, "this is how we say it in the
5 sign," do you?

6 A. No.

7 Q. So what the customers know is the signs have a brand on
8 them; that's what they know, right?

9 A. Sure.

10 Q. And if it's a Kirkland Signature product, the sign would
11 say "Kirkland Signature," right?

12 A. It should be on the first line on that sign, yes.

13 Q. So even when it comes to the Kirkland Signature brand, you
14 put the Kirkland Signature brand on it. That's your practice?

15 A. That's our protocol.

16 Q. Right. Now, Costco also sells some luxury or high-end
17 brand products, right.

18 A. Also.

19 Q. In addition to this run-of-the-mill supermarket
20 by-the-pallet-full quantities of stuff, Costco also sells small
21 amounts of some brand-name products, right?

22 A. Yes.

23 Q. You don't sell those by the pallet full, right?

24 A. No.

25 Q. So Costco has sold Louis Vuitton, right?

G9FMTIF2

Schutt - direct

1 A. Yes.

2 Q. Costco has sold Prada, right?

3 A. Yes.

4 Q. Costco has sold Armani?

5 A. Yes.

6 Q. Costco has even sold Tiffany sunglasses, right?

7 A. Yes.

8 MR. MITCHELL: Mr. Cole, can you please pull up from
9 PTX65, page 65.002. And if you would, would you blow up, I'm
10 sorry, I've got some -- okay. If you can, can you blow that
11 picture up? Okay.

12 Q. This is a photograph that's part of Plaintiff's Exhibit 65.
13 Is that a photograph of the Costco standard jewelry case?

14 A. Is that in my book? Because this is kind of blurry and
15 sideways.

16 Q. No, it's not. Mr. Dabney asked that I not use the one in
17 the book, so I'm using this one.

18 A. Yes.

19 Q. So the jury can understand. First, you can see a little
20 bit of the warehouse, the concrete floor, the high ceilings,
21 the poles, the unfinished look, correct?

22 A. Yes.

23 Q. The jewelry case, first of all, is made of glass, right?

24 A. Yes.

25 Q. And it's locked.

G9FMTIF2

Schutt - direct

1 A. You bet.

2 Q. Right. The portion, there's a lower portion and an upper
3 portion. There's a setback wedding cake-like portion on the
4 top. That's the section where you sell watches, right?

5 A. Typically it's almost all watches. There's a couple of
6 other things in there occasionally. Yes.

7 Q. And on one end of this jewelry case, on the bottom portion,
8 if you look down this way, you have fine jewelry, correct?

9 A. Yes.

10 Q. And on the portion above the fine jewelry, maybe there or
11 right around the corner, you'll have high-end watches, right?

12 A. Yes.

13 Q. So your most expensive watches sit right above your
14 high-end jewelry, right?

15 A. Yes.

16 Q. Okay.

17 A. Yes.

18 Q. And some of the high-end watches you sell, Rolex?

19 A. Yes.

20 Q. Cartier?

21 A. You bet.

22 Q. Is that a yes?

23 A. Yes.

24 Q. Breitling?

25 A. Yes.

G9FMTIF2

Schutt - direct

1 Q. TAG Heuer?

2 A. Yes.

3 Q. Others. Chanel? Might be others?

4 A. Yes.

5 Q. Would you agree with me that those branded watches have a
6 reputation for high quality and craftsmanship?

7 A. Yes.

8 Q. And would you agree with me that they are generally
9 considered luxury brands?

10 A. Yes.

11 Q. Same for Louis Vuitton, Prada, Armani, Tiffany with the
12 sunglasses, all those are luxury brands?

13 A. Yes.

14 Q. Now, none of these items is a high volume item at Costco,
15 right?

16 A. Not relative to a lot of other items, no.

17 Q. Insignificant these particular items to the overall bottom
18 line of 120 billion, I think you said, right?

19 A. Yes.

20 Q. Infinitesimal in the scheme of things, right?

21 A. We'd like to get more.

22 Q. Right, but it's infinitesimal now?

23 A. Yes.

24 Q. The signs that use Tiffany as a standalone in the jewelry
25 case, those signs were sold right next to where all of these

G9FMTIF2

Schutt - direct

1 branded watches were also sold, weren't they?

2 A. I would expect that to be true, yes.

3 Q. Well that would be the only place -- the only place you put
4 your high-end jewelry is right next to where you put your
5 branded watches, correct?

6 A. Yes.

7 Q. Isn't it true that your management of how this whole
8 jewelry arrangement was supposed to be set up, I'm talking
9 about the jewelry counter arrangement, is that each store was
10 given a schematic; high-end jewelry goes on the end, expensive
11 branded watches go in a certain portion of the case, and you
12 didn't leave it to each store to decide how these items would
13 be displayed, right?

14 A. They had autonomy but we gave a recommended layout to our
15 locations.

16 Q. But when you would walk into the store to visit stores you
17 would walk past that counter and see things were displayed the
18 way they were supposed to be which is expensive watches near
19 the high-end jewelry, right?

20 A. Sure.

21 Q. That was yes?

22 A. Yes.

23 Q. Now, the products, the branded products, these luxury
24 branded products that I just mentioned to you, none of them
25 sell directly to Costco for you to sell their products in

G9FMTIF2

Schutt - direct

1 stores, right?

2 A. There's one that I should clarify, if I can.

3 Q. What brand? Just give me the brand.

4 A. TAG Heuer sold us direct at a time.

5 Q. One -- at a time. They no longer do?

6 A. I'm not sure.

7 Q. So other than TAG Heuer, Louis Vuitton, Tiffany, Armani,
8 Prada, that whole list, none of them sell you directly?

9 A. No, they don't.

10 Q. And Costco gets these products from companies that don't
11 sell to them directly from secret sources, right?

12 A. Secret sources?

13 Q. Yes.

14 A. Yes.

15 Q. And you have people all over the world looking on your
16 behalf to see if they can find some of this high-end branded
17 stuff so you can sell it in your store at a discount, right?

18 A. Yes.

19 Q. A lot of the things that these people find might be in
20 Europe, Asia, you name it, right?

21 A. I think so.

22 Q. And you don't get a lot of this stuff, it's usually either
23 outdated or there's some, it's leftover goods from someplace,
24 bankruptcy sales, who knows what the thing, but this is not
25 necessarily current merchandise, right?

G9FMTIF2

Schutt - direct

1 A. Not all the time. Sometimes it's current, sometimes it's
2 not.

3 Q. A lot of times it's not, right? Maybe not that old, but a
4 little old?

5 A. Old is a relative term, but okay.

6 Q. Okay. One season or two seasons old.

7 A. I have -- okay.

8 Q. Okay. So you don't get enough of these products from these
9 secret sources to fill every one of your stores with that
10 particular product, right?

11 A. No.

12 Q. So what you really get are small quantities, certainly
13 relatively small quantities of whatever it is that you're able
14 to find, right?

15 A. Yes.

16 Q. And then you take whatever you find and you distribute it
17 here and there to your various stores so you'll have a few
18 stores, maybe more than that if you're able to get a hundred
19 watches, who knows, but you're going to have, some of your
20 stores are going to have some of these products in small
21 quantities, right?

22 A. Yes.

23 Q. And it's not a lot of stuff, so for the overall scheme of
24 things for Costco, it's very small in terms of the profit that
25 you're going to make from selling these small quantities of

G9FMTIF2

Schutt - direct

1 goods. I mean, is a hundred -- let's say a hundred watches, is
2 that a typical quantity, let's say?

3 A. It depends, you know. I'll say yes because it could be
4 more, could be less.

5 Q. I mean Rolex, you're not getting thousands of Rolexes.

6 A. We're not getting a hundred of them.

7 Q. Pardon me?

8 A. We're not getting a hundred of those.

9 Q. How many Rolexes would you get?

10 A. I can't really say a number. It varies by time of year.

11 Q. Less than a hundred?

12 A. Less than a hundred.

13 Q. Cartier less than a hundred?

14 A. Depending on the time of year, yes.

15 Q. So you're basically sending one watch to that warehouse,
16 one watch to that warehouse and a few of your warehouses will
17 have Cartier, some will have Rolex, a few have Louis Vuitton
18 bags -- you're not getting a thousand of those, they don't make
19 a thousand. So a few of those?

20 A. Yes.

21 Q. Costco uses these branded products in something it calls
22 the treasure hunt, right?

23 A. There are a lot of products that are used in what we call
24 our treasure hunt, but those particular brands would be part of
25 that concept, sure.

G9FMTIF2

Schutt - direct

1 Q. And the treasure hunt is something you use to surprise your
2 members, right?

3 A. I think it's a big reason why our members shop with us.

4 Q. Big reason why your members shop. You'll be surprised?

5 A. Sure.

6 Q. You walk into a Costco and maybe you'll find a Louis
7 Vuitton bag, right?

8 A. Yes.

9 Q. And since you don't get many, it depends on what Costco you
10 go to, like playing the lotto, if you walk into the right
11 Costco --

12 A. Winning the lottery.

13 Q. Winning the lottery. So I go to Costco one day, I walk in
14 and my God, I'm wearing a Rolex, I see there's my Rolex, and
15 it's expensive, and you only have one. It's in the Costco in
16 Brooklyn, but I happen to walk into the Costco in Brooklyn that
17 day and it was sitting there. My lucky day, right?

18 A. Yes.

19 Q. And if I walked into the wrong Costco on that day I
20 wouldn't have seen a Rolex watch?

21 A. No.

22 Q. That's the concept of the treasure hunt, right?

23 A. Part of it.

24 Q. You never know what prices you're going to find when you
25 walk into a Costco?

G9FMTIF2

Schutt - direct

1 A. You're getting me excited, yes.

2 Q. Right. Keep being excited. Now, let's get back to the
3 watches for a moment that are a part of this treasure hunt.

4 You're not an authorized, you being Costco, you're not
5 an authorized distributor of Cartier or Rolex watches, correct?

6 A. We don't sell anything we can't legally -- we don't buy
7 anything we can't legally sell.

8 Q. I'm not talking about legally sell, but if I buy, for
9 example, if I buy a Cartier watch from Cartier, a Cartier store
10 on Fifth Avenue, I get a Cartier warranty with that watch,
11 right?

12 A. Yes.

13 Q. The watches, the Cartier watches you sell do not come with
14 a Cartier warranty, right?

15 A. No.

16 Q. No, meaning they don't?

17 A. No, they don't.

18 Q. So you are selling these -- I'm not trying to cast
19 aspersions. I want the jury to understand I'm not saying
20 there's anything wrong with this. I'm saying you are selling
21 watches outside the ordinary source of distribution of these
22 luxury brands, right?

23 A. Yes.

24 (Continued next page)

1 Q. And because you're not an authorized -- and I'm using it
2 not that you're not allowed to sell it, but you're not one of
3 the network of dealers that are authorized -- because you're
4 not an authorized seller, those brands don't offer their own
5 company warrantee for these products. Right?

6 A. Yes.

7 Q. Now, if you would, please turn to PTX 117 in your book. Is
8 this a sign that Costco posts on its jewelry counters at each
9 of its stores?

10 A. Yes.

11 MR. MITCHELL: I offer Plaintiff's Exhibit 117.

12 MR. DABNEY: No objection, your Honor.

13 THE COURT: Plaintiff's 117 is admitted and may be
14 published.

15 (Plaintiff's Exhibit 117 received in evidence)

16 Q. So let's look at this for a moment. This is a customer
17 satisfaction policy you post at the jewelry counters of each of
18 your stores, right?

19 A. It should be there.

20 Q. And you post this to tell your customers that you may be
21 acquiring these watches outside the ordinary course of
22 distribution of these companies. Right?

23 A. Yes.

24 Q. And these companies may not honor a warrantee or they may
25 not provide you with warrantee service if you need it. Right?

G9MATIF3ps

Schutt - direct

1 A. Yes.

2 Q. And that if there is a problem, Costco will take care of
3 the problem. Right?

4 A. You bet.

5 Q. Right. Yes.

6 A. Yes, you bet.

7 Q. OK. So you're also telling your customers with this
8 customer satisfaction policy that you're working hard for them,
9 looking for the best possible prices on the best stuff you can
10 find, but sometimes you find this stuff in places that the
11 manufacturers wouldn't themselves have authorized you to get it
12 from, right?

13 A. Yeah.

14 Q. And you're saying, even though we found these items from
15 your secret sources, since the manufacturers won't stand behind
16 it, don't worry, Costco will. Right?

17 A. Yes.

18 Q. So you tell your customers, in each and every one of your
19 stores, that you are out there scouring the world for these
20 outside-of-the-ordinary-course-of-distribution branded items so
21 that you can offer them in your store. Right?

22 A. Yeah.

23 Q. OK.

24 MR. MITCHELL: Mr. Cole, can we turn back to
25 Plaintiff's Exhibit 14 -- I'm sorry. Can I offer -- I didn't

G9MATIF3ps

Schutt - direct

1 offer -- I did offer it. Sorry.

2 THE COURT: 117 has been admitted.

3 MR. MITCHELL: Has been admitted already.

4 Q. Could I direct your attention to Plaintiff's PTX 144.006.

5 A. Could you give me that number again, please.

6 Q. I'm just going to post it to your screen.

7 A. OK.

8 THE COURT: And when you said 006, that's a reference
9 to --

10 MR. MITCHELL: That's the page number.

11 THE COURT: -- a page within Exhibit 14?

12 MR. MITCHELL: Yes. It's actually the annual report,
13 page 4, but the number on the bottom is PTX 14.006. Thank you,
14 your Honor.

15 THE COURT: Thank you.

16 MR. MITCHELL: Could we go down to this paragraph
17 right here, the one thing it's all about.

18 Q. Now, in your annual report, you reported to the public in
19 your 2012 annual report, "Although we continue to expand our
20 Kirkland Signature merchandise offerings, we also continue to
21 bring our members the latest, most interesting brand name
22 merchandise at exceptional values. This kind of merchandise
23 not only sells well but helps create a 'buzz' among our
24 members." Is that buzz you're looking to create something that
25 you used the treasure hunt for?

G9MATIF3ps

Schutt - direct

1 A. Yes.

2 Q. I think you said, I think your words were, you want to make
3 your members excited.

4 A. I got a -- I was getting excited, yes.

5 Q. You were getting excited.

6 A. The way you were describing it, I mean.

7 Q. It's that exciting, the treasure hunt.

8 A. I'm excited about this company, yes.

9 Q. OK, great. Was it your idea?

10 A. Which part?

11 Q. The treasure hunt was your idea?

12 A. No.

13 Q. The treasure hunt is not about selling, or making profit on
14 the sale of these small amounts of items themselves, right?

15 A. We like, you know, we try not to sell anything below cost,
16 so we do want to make money on anything we sell, of course.

17 Q. Right. But it's not, in the scheme of a \$120 billion
18 company, it's nothing, right?

19 A. Not to the bottom line.

20 Q. Yes. So it's about the buzz, right?

21 A. Sure.

22 Q. Get people into your stores. Right?

23 A. Sure.

24 Q. Come back, check and see if there's a surprise for you
25 today. Right?

1 A. Renew your membership.

2 Q. Renew your membership.

3 A. Sure.

4 Q. Right? Got a call from a friend who went to the Costco in
5 Rockaway and said, you won't believe what I found here.

6 Somebody goes to the Costco in, I don't know, somewhere in New
7 Jersey, and checks their store to see if they find the same
8 thing. That kind of stuff, right?

9 A. Right.

10 Q. That's part of the buzz. You won't believe what I found at
11 Costco.

12 A. Yes.

13 Q. And these treasure hunt items are part of that whole
14 marketing strategy of getting people into your stores more
15 often. Right?

16 A. Yes.

17 Q. You don't want people just coming in when they need toilet
18 paper and paper towels or soda. You want them to come in in
19 between those visits, right?

20 A. We want them to buy every time they come.

21 Q. Right. Drive by and stop in. Right?

22 A. Sure.

23 Q. Maybe you'll be surprised.

24 A. OK.

25 Q. Yes?

G9MATIF3ps

Schutt - direct

1 A. Yes.

2 THE COURT: Mr. Schutt, could you just keep your voice
3 up a bit more.

4 THE WITNESS: You bet. Is that better?

5 THE COURT: Yes. Thank you.

6 THE WITNESS: OK. Sorry.

7 Q. Now, would you turn, Mr. Schutt, to PTX 20 in your book.
8 This is a standard Costco store layout, correct?

9 A. Yes.

10 Q. It's called, you call it a master, call it a master layout
11 for a certain type of store, correct?

12 A. Yes.

13 MR. MITCHELL: I offer Plaintiff's Exhibit 20.

14 MR. DABNEY: No objection, your Honor.

15 THE COURT: Plaintiff's Exhibit 20 is admitted and may
16 be displayed.

17 (Plaintiff's Exhibit 20 received in evidence)

18 MR. MITCHELL: Mr. Cole, can we just enlarge it as
19 much as we can on the screen. No, not that large, too close.
20 Just so it fills the screen but doesn't -- just so this part,
21 that part fills the screen. Right there, thank you, perfect.
22 Excellent.

23 Q. OK. So the jury understands the Costco layout, because
24 this is all -- at Costco you think through a lot, don't you,
25 about marketing, merchandising, and selling products?

G9MATIF3ps

Schutt - direct

1 A. Yes.

2 Q. You don't get to be number two in the United States without
3 doing that. Right?

4 A. Of course not.

5 Q. OK. So first over here, in this particular -- and it may
6 be more clear for you in the book, because I think the book is
7 probably -- it's the same documents. You might want to refer
8 to the paper copy. But if you look at the screen, this right
9 here, that solid line, that is a fence that you put in every
10 Costco at the entrance, correct?

11 A. Yes.

12 Q. So on this side of the fence, that's the way in. That's
13 supposed to be an arrow. And on this side of the fence is the
14 way out. Right?

15 A. Yes.

16 Q. These are your cash registers. Right?

17 A. Yes.

18 Q. So the traffic flow is intended to be in, around, and then
19 back that way. Right?

20 A. Generally, yes.

21 Q. Yes. And there's no other way in. You've got to go in
22 that way, past the fence, into the store on that ail, in every
23 store. Right?

24 A. Yes.

25 Q. And on the way in you have to show a membership card to get

1 in. Right?

2 A. Yes.

3 Q. OK. Now, if we can, let's go to PTX 21. Mr. Schutt,
4 that's just an enlargement of the entryway. You see that?

5 A. I see that.

6 MR. MITCHELL: We offer PTX 21.

7 MR. DABNEY: No objection, your Honor.

8 THE COURT: PTX 21 is admitted and may be displayed.

9 (Plaintiff's Exhibit 21 received in evidence)

10 Q. So, again, you may prefer the paper copy just so you can
11 read it. This now shows, in a closeup, the entryway. So as
12 you come in the store in this particular layout -- this is your
13 master layout -- this is your main aisle. Right?

14 A. Yes.

15 Q. And in this, in the master plan, this is your high-end
16 jewelry counter, right? That's your jewelry counter.

17 A. That's typically where it's put, yes.

18 Q. Right on the maybe aisle, right by the entrance, right?

19 A. Yes.

20 Q. And the high-end jewelry sits in the end, or at the end of
21 that jewelry display counter, facing the main aisle. That's a
22 requirement of your standard layout for the jewelry counter.
23 Right?

24 A. Yes.

25 Q. OK. So the intention that Costco has, in walking into all

G9MATIF3ps

Schutt - direct

1 of these stores, is that members entering the store will come
2 in the main aisle and pass the high-end jewelry counter on the
3 way in. Right?

4 A. Yes.

5 Q. And can you give the jury just an idea of this high-end
6 counter, a price range of products that you'll put in that
7 counter.

8 A. In the whole case?

9 Q. No, just in the end, just a high-end end cap where you put
10 the most expensive stuff.

11 A. I would say generally speaking that's where our diamonds
12 are. I would say the prices would range from a couple thousand
13 to, the highest, \$250,000.

14 Q. In that case.

15 A. Yes.

16 Q. So a lot of \$250,000 rings.

17 A. No.

18 Q. They're to catch the eye, right?

19 A. Offering a hell of a value. Yes.

20 Q. Right. Eye popping.

21 A. To see it, yeah.

22 Q. So a \$250,000 ring in a jewelry case in a Costco, you're
23 not really expecting to sell that ring. What you're expecting
24 to do is attract attention to the fact that you sell jewelry.

25 A. Oh, I want to sell that ring.

G9MATIF3ps

Schutt - direct

1 Q. I know you do, but only one is not going to really keep the
2 lights on in a Costco for an hour, right, not at a 10.2 percent
3 markup.

4 A. Makes somebody really happy.

5 I don't mean to be a smart as. I'm just saying that.

6 Q. I understand. But at your 10 percent markup, that's only a
7 \$20,000 profit. How many employees do you have in that store?

8 A. We average probably about 400 so.

9 Q. In ten minutes the profit from that ring would be
10 dissipated in salary, right?

11 A. It all adds up.

12 Q. Yes, I get it. But really the point of that is to attract
13 attention to the case, right?

14 A. Yeah.

15 Q. And the jewelry case is also one of the, what I would say
16 clever ways that Costco has devised to draw people into the
17 store on a basis that's more regular than household stuff,
18 right?

19 A. That, no.

20 Q. OK.

21 A. Can I, can I, can I clarify for you?

22 Q. That's OK. If you're saying that's not what it is, then
23 OK.

24 A. Part of it.

25 Q. I accept that. Let's move beyond that.

1 A. OK.

2 Q. It's certainly there to attract attention to the fact that
3 we sell jewelry.

4 A. Absolutely.

5 Q. And when you sell jewelry in the case at the end of the
6 jewelry counter, generally speaking in the high-end portion you
7 have one of a kind of an item at a time. Right?

8 A. I'd say usually, yes. Yeah.

9 Q. Right. When that item is sold, you may or may not restock
10 that item at that location, right?

11 A. No. It depends.

12 Q. Right. So it still falls within the, if you see it here
13 today and don't buy it, it may be gone tomorrow. Right?

14 A. Yes.

15 Q. You're saying -- you're hesitating a bit. I assume that's
16 because these are more regularly manufactured products that
17 would appear in stores more often than just a treasure hunt,
18 right?

19 A. If you let me explain, yes, but may I explain?

20 Q. OK. I'll let you explain it.

21 A. We have some, some solitaire rings that we sell on a more
22 regular basis that we would have in a lot more often than, you
23 know, a Tiffany or a Cartier watch or a Louis Vuitton bag. So
24 there's clarification there, for the jury.

25 Q. So for the ring, for the style of ring that's involved in

G9MATIF3ps

Schutt - direct

1 this case is a style of ring that you would have in the case
2 more often, as a product line, more often than you would have a
3 Louis Vuitton bag.

4 A. Yeah.

5 Q. Costco even offered a million dollar ring for sale once,
6 right?

7 A. Yes.

8 Q. That got a lot of publicity, right?

9 A. I think so.

10 Q. Yeah. People were surprised that Costco even sold jewelry
11 when you promoted the \$1 million ring, right?

12 A. Sure.

13 Q. So these 3 million people a day who walk through Costcos,
14 around -- is that the world, 3 million around the world or
15 there's even more? Am I low on that number too?

16 A. I think you're low.

17 Q. I'm low. So even more than 3 million a people walking
18 through a Costco, the intention is that they should have their
19 attention drawn to this high-end jewelry case on their way into
20 the store, no matter what they're at the store to purchase.

21 Right?

22 A. OK.

23 Q. Yes?

24 A. Yes.

25 Q. That's your goal as a merchant. As head of merchandising,

G9MATIF3ps

Schutt - direct

1 that's what you would like to see happen, right?

2 A. Yes.

3 Q. And it's true, isn't it, that the items that you sell in
4 this case are the most expensive items in the entire store.
5 I'm not just saying individually but I mean you don't have any
6 other \$250,000 products or \$20,000 products, something like
7 that. So this is your really expensive stuff. Right?

8 A. Yes.

9 Q. The idea of drawing people's attention to the jewelry case
10 on the way in is to let them know, even if they're not in the
11 market at a particular time for a product, that, for example,
12 let's say you're getting engaged, that you will remember, hey,
13 Costco sells engagement rings, maybe I should check there
14 first. Right?

15 A. Yeah.

16 Q. And this jewelry case is therefore a significant part of
17 the overall marketing that Costco does of itself to its
18 members, right?

19 A. It's part of it, yes.

20 Q. So on these thousands of visits that you made to Costco
21 stores while you were the head of merchandising, it's fair to
22 say that on the way into the store most of the time you would
23 look at the jewelry case. Right?

24 A. Yes.

25 Q. Mr. Schutt, have you ever heard of the film *Breakfast at*

1 *Tiffany's?*

2 A. I've heard of it.

3 Q. And do you know that it was made in 1961 and starred Audrey
4 Hepburn?

5 A. I know Audrey Hepburn was in that movie, yes.

6 Q. Would you take a look, please, Mr. Schutt, at page
7 Bates-stamped PTX 38. First of all, have you ever heard of Jen
8 Murphy?

9 A. Yes.

10 Q. Could you tell the jury who Jen Murphy is.

11 A. Jeni is one of our jewelry buyers at Costco.

12 Q. And how about Cindy Gallardo?

13 A. Cindy is, Cindy is not a buyer. I'm, I don't -- I forget
14 what she was doing for us in 2007.

15 Q. And these are two Costco employees. This was marked at
16 Ms. Murphy's deposition back in 2014, February 12, 2014.
17 They're communicating with each other, do you see that, about a
18 ring, about a Tiffany design, quote, Tiffany Novo. Do you see
19 that?

20 A. Yes.

21 Q. And if you turn to the second page, you can see --

22 THE COURT: Are you going to offer this in evidence?

23 MR. MITCHELL: I'm going to have him identify it first
24 and then -- do you have any objection, Mr. Dabney, to my offer?

25 MR. DABNEY: No objection.

1 MR. MITCHELL: Thanks.

2 THE COURT: Plaintiff's Exhibit 38 is admitted in
3 evidence.

4 (Plaintiff's Exhibit 38 received in evidence)

5 Q. OK. So we can see that here. You can see that
6 Ms. Gallardo is writing to Ms. Murphy and she's asking her to
7 take a look at a diamond band when she's in LA next week. And
8 this is written on July 16, 2007. Do you see that?

9 A. I see that.

10 Q. And she describes what it is that she wants Ms. Murphy to
11 look at, which is something called, it looks like it's copied
12 from the Tiffany website, "Tiffany Novo, our newest design, is
13 a, is a dazzling creation of spirit, fire, and style. This
14 brilliant cushion cut creation was inspired by the famous
15 128.54 carat Tiffany diamond." Do you see that?

16 A. Yes.

17 Q. Now, if we go to the second page of this exhibit, you will
18 see an image of the Tiffany Novo. You see that?

19 A. Yes.

20 Q. OK. Now, would you please turn in your book to the
21 document PTX 130.

22 MR. MITCHELL: Can I offer this, Mr. Dabney, or you're
23 going to object? It makes it easier if I could show it to the
24 jury.

25 MR. DABNEY: No objection.

G9MATIF3ps

Schutt - direct

1 MR. MITCHELL: OK. So we offer --

2 THE COURT: PTX 130 is admitted in evidence and may be
3 displayed.

4 MR. MITCHELL: Thank you.

5 (Plaintiff's Exhibit 130 received in evidence)

6 Q. Do you recognize this as a page from the Costco website
7 that sells jewelry?

8 A. Yes.

9 MR. MITCHELL: Can you go to the bottom of the page,
10 Mr. Cole.

11 Q. You can see that this was printed out on September 6, 2016,
12 a couple weeks ago. Do you see that?

13 A. Yes.

14 Q. OK. So I go back to the top of the page. You would agree
15 with me -- this looks like, first of all, you can see that the
16 heading is "cushion cut 3.46 carat," or "CTW," "VS1 clarity E
17 color diamond platinum 'Audrey' wedding set." Do you see at
18 that?

19 A. I see that description, yes.

20 Q. Do you see there's a word set there, do you see the word
21 "set"?

22 A. Yes.

23 Q. Two rings there, there's two rings. There's a wedding band
24 and an engagement. Right?

25 A. Yes.

1 Q. So let's focus on the engagement ring portion. You would
2 agree with me, wouldn't you, that that is almost the same --
3 and, again, I'm not casting aspersions of copying the style.
4 I'm just saying, that's a pretty close copy of the Tiffany Novo
5 style. It's Costco's version of it. Right?

6 A. It appears similar to me, yes.

7 Q. Right. Put them side by side, they look similar, you know,
8 as -- you know, obviously there's some variation, but pretty,
9 pretty close, right?

10 A. Yes.

11 Q. Was the use of the word "Audrey" some kind of joke to like
12 bring to mind *Breakfast at Tiffany's*? Is that how it ended up
13 being called "Audrey"?

14 A. I have no idea.

15 Q. So Costco checked out the Tiffany Novo style in 2007 and
16 created a knockoff of the Tiffany Novo style, and it ends up
17 being called "Audrey" at Costco.

18 A. Could you please --

19 Q. Is that correct?

20 A. Could you please define "knockoff" for me.

21 Q. OK. And I'm not trying to, honestly I'm not trying to put
22 any -- I'm not challenging you on copying stuff. People copy
23 people's styles all the time. I get that.

24 A. Sure.

25 Q. And I'm not even saying it's exact. It's just close. But

G9MATIF3ps

Schutt - direct

1 clearly the inspiration for this Audrey ring was the Tiffany
2 Novo ring. It's almost the same. Right?

3 A. OK. I don't know.

4 Q. Right. And then Costco calls it "Audrey." Right?

5 A. That's what it says there, yes.

6 Q. There's some coincidence, since Audrey Hepburn is very well
7 known for having been the star of the iconic film *Breakfast at*
8 *Tiffany's*, right?

9 A. With people our age, yeah, probably, yeah.

10 THE COURT: Would you find a place in the next ten
11 minutes to stop.

12 MR. MITCHELL: We can stop right now and I can --

13 THE COURT: All right. You have right now a quick
14 ten-minute break. Continue to keep your thoughts to yourself.

15 Ms. Ng, would you escort the jury to the jury room.

16 (The jury left the courtroom)

17 THE COURT: See you all in ten minutes. Thank you.

18 (Recess)

19 THE COURT: Good morning. Mr. Schutt, would you
20 please come back to the witness stand, and, Ms. Ng, would you
21 bring the jury in.

22 We have asked for the temperature to be raised a
23 little. They made it "a little."

24 (Jury present)

25 THE COURT: I would just ask that you put in a call

1 for the temperature, to raise it a little bit more. Thank you.

2 Mr. Mitchell.

3 MR. MITCHELL: Thank you, your Honor.

4 BY MR. MITCHELL:

5 Q. Mr. Schutt, when did you learn that Tiffany had sued Costco
6 for its use of the signs that are at issue in this case?

7 A. I first learned of it on February 14, 2012.

8 Q. So were you one of the -- because this was merchandise, was
9 this something that fell within your sphere of responsibility
10 as the client representative for Costco in connection with this
11 lawsuit?

12 A. No.

13 Q. No?

14 A. No.

15 Q. So you simply found out as part of being an executive of
16 Costco.

17 A. I read it on the Internet and I heard about it in the
18 office, sure.

19 Q. Can you turn your book, please, to PTX 103.

20 MR. MITCHELL: Mr. Dabney, do you have any objection
21 to offering PTX 103?

22 MR. DABNEY: No objection.

23 MR. MITCHELL: Plaintiffs offer PTX 103 as Plaintiff's
24 Exhibit 103.

25 THE COURT: Plaintiff's Exhibit 103 is admitted and

1 may be published.

2 (Plaintiff's Exhibit 103 received in evidence)

3 Q. Mr. Schutt, is PTX 103 an e-mail that was sent by the
4 president and CEO of Costco, Craig Jelenik, to all employees of
5 the company?

6 A. Yes, it is.

7 Q. And are you one of the people, as an employee of the
8 company, to whom this e-mail was sent?

9 A. Yes.

10 Q. And you received it.

11 A. Yes, I did.

12 Q. Had you discussed with Mr. Jelenik before you wrote this
13 e-mail the contents of the e-mail?

14 A. Yes.

15 Q. So were you one of the people he consulted before deciding
16 on a final version of this to be sent out?

17 A. We discussed it.

18 Q. Did you help him write it?

19 A. No.

20 Q. Did you read it before it went out?

21 A. I, I don't recall.

22 Q. Did you agree with it when you saw it?

23 A. Yes.

24 Q. And you were aware of Costco's claims before this e-mail
25 was sent, the date of this being February 19, 2013, correct?

1 A. Could you say that again, please?

2 Q. The date of the e-mail is February 19, 2013?

3 A. Yes.

4 Q. Do you see that? So you already knew about the lawsuit by
5 the time this e-mail went out.

6 A. Yes.

7 Q. At the time of this e-mail, you did not know when Costco
8 first used "Tiffany" in signage, correct?

9 A. Correct.

10 Q. Even sitting here today, you couldn't tell the jury how
11 long the practice had been going on, right?

12 A. No.

13 Q. And obviously since you don't know when it started you
14 don't know all the variations of "Tiffany" in signs that
15 existed throughout the time period because you don't even know
16 when it started, right?

17 A. At this time, yes.

18 Q. Even today.

19 A. Well, I know a lot more today than I did on that date,
20 sure.

21 Q. Going back to the beginning of the usage, you don't know
22 even who wrote it first, who did it first, right?

23 A. No.

24 Q. You don't know the reason the person did it first, right?

25 A. First?

1 Q. The first use.

2 A. No.

3 Q. We had this -- just so we're clear, OK, I know -- I want
4 the jury to understand your testimony. That's why we went back
5 and forth on that solitaire Tiffany from 2007. You had
6 interjected in response to a question from me that it was
7 "Tiffany setting," to "Tiffany set," to "Tiffany" alone, and I
8 pointed out to you that as of 2007 it was already "Tiffany"
9 standalone. Do you remember that?

10 A. Yes.

11 Q. So you have no idea when "Tiffany" as a standalone was
12 first used in signage at Costco, right? You don't know.

13 A. I don't know.

14 Q. And you don't know who the person was who first used it.

15 A. That's correct, no.

16 Q. Since you don't know when it started and you don't know the
17 person, you can't know what was in that person's mind, right?

18 A. No.

19 Q. No, you can't. Right?

20 A. That's correct.

21 Q. And isn't it true that at the time of this e-mail, you had
22 not seen the photographs taken by Tiffany's investigator,
23 Ms. Popp, right?

24 A. No.

25 Q. You had not.

1 A. No.

2 Q. Right. The first time you saw those photographs was on
3 August 15, 2013 when I showed them to you at your deposition,
4 right?

5 A. Yes.

6 Q. OK. So at this point, when this e-mail is going out, your
7 state of knowledge about the use of Tiffany in signage, the
8 historic use of Tiffany in signage, going back to the beginning
9 when it first started, was very little. Right?

10 A. Yes.

11 Q. And other than what was recounted in what we looked at
12 before in that January 31, 2013 letter from your lawyer to me,
13 you didn't know much more than that, did you?

14 A. No.

15 Q. Right. It turns out there was much more than what was in
16 that letter, as we all know now, right?

17 A. Yes.

18 Q. Now, turning to the second paragraph of Mr. Jelenik's
19 e-mail, he writes, "In the past few years, we have sold some
20 high-quality diamonds that were signed and labeled using the
21 word 'Tiffany.' That was intended to describe a setting style
22 used in those rings." At the time Mr. Jelenik wrote that, you
23 didn't know what the intent was in using the word "Tiffany" to
24 describe those rings, did you?

25 A. I did.

1 Q. If you didn't know who did it first, how could you know the
2 intent of what the use was when it started?

3 A. Because I had talked to some individuals, my vice president
4 in charge of that area and the assistant merchandise manager,
5 and I had talked to them about it, sure.

6 Q. So they were the ones who did it first.

7 A. No.

8 Q. They didn't do it first either.

9 A. Not to my knowledge.

10 Q. They didn't tell you who did it first, right?

11 A. No.

12 Q. So based on a conversation you had with people who didn't
13 do it themselves, you took their word for it, what was intended
14 by the person who first used the word "Tiffany" in signs.
15 That's what you're saying.

16 A. OK.

17 Q. Mr. Jelenik goes on. He says in the same paragraph, "In
18 retrospect, it would have been better had we not used that
19 description the way we did." Do you see that?

20 A. Yes.

21 Q. Sitting here today, do you agree with that now?

22 A. Yes.

23 Q. Now, can you turn in the book to PTX 104, please.

24 MR. MITCHELL: Mr. Dabney, we offer PTX 104.

25 MR. DABNEY: No objection.

1 THE COURT: 104 is admitted and may be displayed, PTX
2 104.

3 (Plaintiff's Exhibit 104 received in evidence)

4 Q. Now, Mr. Schutt, this is a letter that you sent on April 5,
5 2013. Do you see that?

6 A. Yes.

7 Q. And you write, "Dear Costco member," right?

8 A. Yes.

9 Q. At the time you wrote this letter, you had still not seen
10 photographs taken by Ms. Popp at the Costco store in November
11 2012, right?

12 A. No.

13 Q. Right. You had not. So you did not know what the display
14 case at Huntington Beach looked like on the day Tiffany
15 complained about what that display case contained, right?

16 A. I did not.

17 Q. You did not. And just as a universe, what was the universe
18 of people you thought you were sending this letter to, as a
19 description?

20 A. I wasn't sure what the number was.

21 Q. I'm not talking about the number. I'm talking about,
22 describe to me -- at this point, the lawsuit was filed in
23 February 2014 -- 2013. Right?

24 A. Yes.

25 Q. The answer and counterclaim was filed in March, right?

1 A. OK.

2 Q. I think we looked at the date yesterday. It was March 8.
3 You remember?

4 A. Yes.

5 Q. So your letter was coming out less than a month after
6 Costco filed its answer and counterclaim, right?

7 A. Yes.

8 Q. So someone, within a month of filing the answer, thought it
9 was a good idea at Costco to write to certain of your members,
10 right?

11 A. Yes.

12 Q. And at that point, we're in the very, very early stage of
13 the lawsuit, so almost nothing had happened in the lawsuit yet,
14 right?

15 A. Yes.

16 Q. So you had to go out there and say, I'm going to send a
17 letter to these people. Describe for me the universe of what
18 "these people" was.

19 A. Well, these, these people were those who had purchased
20 diamond rings that said -- had "Tiffany" anywhere in the
21 description of that particular diamond ring.

22 Q. Going how far back in time?

23 A. I don't recall what -- how far back.

24 Q. And you didn't personally gather this list, right?

25 A. I did not.

1 Q. You didn't address the envelopes.

2 A. I did not.

3 Q. They went to some place to be sent out. Correct?

4 A. Yes.

5 Q. But you had some understanding, I'm sure, about how many
6 people were in this universe that you were writing to. Right?

7 A. I didn't know the exact number of, the number of people
8 that bought those rings.

9 Q. Well, I don't want to quibble with you if that's your
10 answer. Let me drill down on that just for a moment. Hold on
11 a second.

12 This is a letter you're writing to members who you
13 care a lot about, you said yesterday, telling them about an
14 issue as it relates to this lawsuit. Right?

15 A. Yes.

16 Q. And I assume you don't write to Costco members very often
17 about issues in lawsuits, right?

18 A. No.

19 Q. And you have no interest in writing letters to people you
20 don't intend to get your communication when you're writing to
21 members like this, right?

22 A. Yes.

23 Q. So from the standpoint of a member receiving a letter from
24 one of the top executives at Costco, for that member, this must
25 be an important communication. Right?

1 A. This was.

2 Q. Right. So one would reasonably expect as part of your
3 job -- you know, I use "global head." That's probably the
4 wrong -- at least head of all the merchandise sold in the
5 United States for Costco and on the executive board. Are you
6 saying you did not ask anyone, before this letter went out, how
7 many of these letters are there, how many people are affected?

8 A. I don't recall asking anybody how many were to go out.

9 Q. So you were just sending this e-mail out without knowing
10 the universe.

11 A. OK.

12 Q. That's what you're telling the jury.

13 A. Yes.

14 Q. OK. You remember at your deposition I asked you how many
15 letters you thought you sent. Right?

16 A. Yes.

17 Q. And that was in August of 2013, less than four months, or
18 about four months after you had sent the April letter. Right?

19 A. Yes.

20 Q. And at that deposition you were represented by lawyers.
21 Right?

22 A. Yes.

23 Q. You met with your lawyers before you were deposed, right?

24 A. Yes.

25 Q. You knew going into that deposition that the subject matter

1 of this letter would be discussed at that deposition, right?

2 A. Yes.

3 Q. And I asked you, how many of these letters did you send,
4 and you said you didn't remember the exact number but you
5 estimated it was around 11,000. Didn't you do that?

6 A. Yeah, I did do that.

7 Q. And you didn't say to me at the time, I never asked anybody
8 how many letters were sent, did you?

9 A. No.

10 Q. And the explanation you just gave about, you know --
11 withdrawn.

12 You didn't give any indication in the response, that
13 answer to me, that your estimate was way off from 11,000. You
14 thought it was around 11,000. Right?

15 A. I had heard that in passing from somebody. I, I didn't
16 know the number. I did say that my guess was around 11,000. I
17 did say that.

18 Q. I can read -- should we read it exactly or it doesn't
19 matter? You're sitting here today and you're saying to me that
20 you admit at that deposition you estimated 11,000. Right?

21 A. That was my guess.

22 Q. So you're saying a guess now. You didn't use the word
23 "guess." I don't think -- you're saying you used the word
24 "guess"?

25 A. I did not say that.

1 Q. You did not say "guess."

2 A. I did not say "guess" in the deposition.

3 Q. Right. You said you did not know the exact number but you
4 estimated around 11,000. Yes?

5 A. OK. Yes.

6 Q. And when you gave me that estimate, it was just four months
7 after you had sent the letter in April 2013. Right?

8 A. Yes.

9 Q. And when you gave that answer and that estimate, you knew
10 you were under oath, right?

11 A. Yes.

12 Q. Now turning back to your letter, you start by saying --
13 well, first of all, do you see in this letter anywhere that
14 this ring was not made by Tiffany that they bought?

15 A. It does not say that.

16 Q. Does not say that. So you're supposedly writing to your
17 customers, whom you value, coming clean to them that if they
18 want to return their ring they should do it, but you're not
19 even telling them why it is they might want to return the ring.
20 Right?

21 A. Yes.

22 Q. So supposedly you're writing to people who may have heard
23 about the lawsuit who would be concerned that they bought rings
24 that said "Tiffany" in the jewelry case, but you're not telling
25 them in the letter that the ring isn't even made by Tiffany.

1 A. No.

2 Q. So that's a pretty crafty way to write the letter, right?

3 A. OK.

4 Q. Let's go through it. I think the jury should hear -- we
5 should look through it. It's not as clear on the screen. I'll
6 read what you wrote. "Dear Costco member: Our records
7 indicate that you purchased a diamond ring at one of our Costco
8 warehouses." So you don't say "a diamond ring with a sign that
9 said Tiffany," right? You said "you purchased a diamond ring."

10 A. Yes.

11 Q. Vanilla.

12 A. Yes.

13 Q. "We hope you have been fully satisfied with your purchase."
14 Well, you're about to tell them -- you're supposedly
15 communicating something that would make them unhappy about
16 their purchase, and you're hoping that they're satisfied with
17 their purchase. Does that really make sense to you now,
18 looking at this letter?

19 A. I don't look at it that way, about unhappy.

20 Q. OK. Next sentence. "We are writing to you because a
21 jewelry store chain, Tiffany & Co., recently filed a lawsuit
22 against Costco complaining about certain signs that were used
23 to describe rings on display in Costco warehouses. The signs
24 use the word 'Tiffany' to indicate a ring that had a
25 Tiffany-style pronged setting holding the diamond." Did I read

1 that correctly?

2 A. Yes.

3 Q. That's not what Tiffany said. Tiffany sued Costco because
4 it was selling diamond rings that were not made by Tiffany but
5 the sign said "Tiffany" on a standalone basis, right? Isn't
6 that what this lawsuit was about?

7 A. OK.

8 Q. OK. Then you go on in the next sentence and say, "We do
9 not believe that our signs were inaccurate." So let me finish,
10 I want to finish in the sentence. "We do not believe that the
11 signs were inaccurate; however, under our member satisfaction
12 policy you have the right to return your ring to a Costco
13 warehouse for a full refund if for any reason you are not
14 satisfied."

15 First of all, for somebody to even know what you're
16 writing to them about and what they should be complaining
17 about, they would have to have heard about the lawsuit, right?

18 A. Maybe.

19 Q. Maybe? Why would they know what you're telling them if --
20 we're not saying, you bought a ring. You're not saying in your
21 letter, you bought a ring, with a sign that said "Tiffany,"
22 that was really made by Costco. You're not saying that, are
23 you?

24 A. I sent this letter out because if there was any
25 misunderstanding, at all, from our -- on our members' part that

1 they had a misunderstanding of what they were buying, I wanted
2 to be perfectly clear to them and make sure they understood, if
3 they misunderstood anything, that they could return that
4 diamond ring to Costco.

5 Q. But how would they know if they misunderstood if they
6 hadn't heard about the lawsuit and you're not telling them that
7 the ring that had "Tiffany" in the sign wasn't made by Tiffany.
8 How could they possibly know that? You're not explaining to
9 them, right?

10 A. There was enough press out there on the Internet and --
11 that I, I wanted to send this letter out to make sure, if
12 there's any misunderstanding, any misunderstanding at all, that
13 they could please return that diamond if they misunderstood in
14 any way.

15 Q. So when Mr. Dabney said to the jury, Costco was taking
16 responsibility for what happened here, your letter of April 5,
17 2013 is one of the things that you think shows Costco taking
18 responsibility.

19 A. It shows we want to do the right thing.

20 Q. Right. But you don't say specifically in your letter that
21 we sold you a ring with "Tiffany" in the sign that wasn't made
22 by Tiffany, do you?

23 A. No.

24 Q. And to the extent anybody hadn't heard about the lawsuit,
25 then those people as well wouldn't even know what you're

1 writing about because you're just telling them that you
2 described the ring properly.

3 A. Yes.

4 Q. I had asked you earlier, Mr. Schutt, whether getting caught
5 and changing your practice, and doing the right thing are the
6 same thing. And you said no. Do you remember that?

7 A. Yes.

8 Q. Now, here's an instance of getting caught, writing a letter
9 to your valued members, who may have been misled by signage in
10 your jewelry case, and you're not even telling them in your
11 letter that your signs said "Tiffany" and the rings were not
12 made by Tiffany and Company. Correct?

13 A. Correct.

14 Q. So taking responsibility the way Costco is defining it is
15 not even, when you're writing to people who may have been
16 directly affected by the signage, is telling those people
17 honestly and truthfully that that ring you bought was made by
18 Costco, not Tiffany & Company, right?

19 A. I told you why I wrote the letter, sir.

20 Q. I know why you wrote the letter. That wasn't my question.
21 The question to you is, when you're coming clean to your own
22 customers and supposedly taking responsibility, your counsel's
23 words, you're not even coming clean enough to say fully and
24 honestly and truthfully to those customers, it may have said
25 "Tiffany" in the sign but the ring was made by Costco. You're

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1 not saying that, are you?

2 A. No.

3 Q. And the statement that you have here, "We do not believe
4 that our rings were -- that our signs were inaccurate," you
5 believe that to this day.

6 A. Yes.

7 MR. MITCHELL: I have nothing further.

8 THE COURT: Mr. Dabney.

9 MR. DABNEY: Your Honor, may I approach the witness
10 with binders?

11 THE COURT: Yes, you may.

12 Thank you.

13 MR. DABNEY: Could I have the Elmo, Ms. Ng, please.

14 CROSS EXAMINATION

15 BY MR. DABNEY:

16 Q. Good morning, Mr. Schutt, or good afternoon.

17 A. Good afternoon.

18 Q. I would like to take up where counsel for the plaintiff
19 left off, which was your letter to members which we were just
20 looking at. I think it was Plaintiff's Trial Exhibit 104. So
21 I will put it up here so we can look at it.

22 Mr. Schutt, do you recall being asked about the style
23 of diamond rings that were identified by the signage at issue
24 in this case?

25 A. No.

1 Q. Well, let me show you what was.

2 MR. MITCHELL: May I confer with Mr. Dabney for one
3 moment?

4 THE COURT: Yes.

5 (Counsel confer)

6 Q. Mr. Schutt, are you familiar -- were you here when Ms. Popp
7 came in and testified on the first day of trial?

8 A. Yes.

9 Q. And do you recall that she produced a photograph of a
10 diamond ring that had been offered for sale in the Huntington
11 Beach store?

12 A. Yes.

13 Q. I'm going to put up on the screen a copy of Plaintiff's
14 Trial Exhibit 25, which is in evidence. This is the item
15 639911 that Ms. Popp testified about. You saw that?

16 A. Yes.

17 Q. And I want to ask you, you were asked a whole series of
18 questions about Costco's signage. And when you said in your
19 letter to members, "We do not believe that our signs were
20 inaccurate," do you believe that statement was true at the
21 time?

22 A. Yes.

23 Q. Now, can you walk us through what each word on the sign as
24 understood by you to mean.

25 A. So this sign here has "platinum" as the first word there,

1 and that describes the metal that is used on the band for that
2 ring. My understanding that the Tiffany brand after that was
3 used to describe the type of setting for that ring. Then ".70"
4 is the carat of the ring. "VS2" is the clarity of that ring.
5 "I" is the color, I believe. And "round" is the size. And
6 then of course "diamond ring," diamond ring.

7 Q. So do I understand you to say that every word on the sign
8 is describing a physical feature of the ring?

9 A. Yes.

10 MR. MITCHELL: Objection, your Honor.
11 Mischaracterizes -- sorry.

12 MR. DABNEY: I will withdraw.

13 Q. Mr. Schutt, does every word on the sign describe a physical
14 feature of the ring, to your understanding?

15 A. Yes.

16 Q. Now, do you know of any other word besides "Tiffany" that
17 describes the particular style of ring setting that that item
18 actually had?

19 A. No.

20 Q. Now, Mr. Schutt, you were asked a series of questions about
21 branded signage in Costco stores. Do you recall that?

22 A. Yes.

23 Q. And I think you made a couple of points about that. Let me
24 put up on the screen, I believe it was marked as Plaintiff's
25 Exhibit 29. Could you look in the plaintiff's exhibit book

1 under Plaintiff's Exhibit 29.

2 THE COURT: Do you want the witness to look in the
3 other notebook?

4 Q. Do you have the plaintiff's exhibit book you were just
5 being asked about?

6 A. Yes, I do.

7 Q. I will just put it up on the screen so you can see. You
8 were shown a sign you had for a Sony 3D Blu-Ray home theater?

9 A. Yes.

10 Q. Now, in Costco stores, what is the practice with regard to
11 branded goods sold in Costco?

12 A. For branded goods, it has always been our protocol to have
13 the brand, manufactured brand of that product in the first word
14 of that first line.

15 Q. And what about selling goods in factory packaging? When
16 Costco sells branded goods, are they sold in factory packaging?

17 A. Yes.

18 Q. Are you aware of a situation where Costco sold branded
19 goods that were not in the factory packaging?

20 A. I could give you an example.

21 Q. OK. In general, then just take an example, you were given
22 this example of a Nikon camera that they showed you. If you
23 sold the Nikon camera, would the camera be delivered in its
24 factory box?

25 A. Yes.

1 Q. Now, in the case of these fine jewelry items, is the
2 signage here consistent with how Costco signs branded items?

3 A. Well, there is not a brand here, so it's, no, it's
4 different.

5 Q. So at the time you wrote your letter, did you think
6 "Tiffany" was a word that described the ring?

7 A. Described a setting.

8 Q. And these products, I believe you said, were delivered in
9 boxes similar to the beige box that I'm holding in my hand?

10 A. Yes.

11 Q. Can you describe for us the purchase sequence for a
12 fine-jewelry item purchase like this. We've seen photos of the
13 jewelry case, but just, can you describe all of the steps that
14 a member would have to go through before they could actually
15 walk out of the building with a diamond ring like this.

16 A. Well, typically at our jewelry counter we have a
17 salesperson there, and a member will ask to look at the ring or
18 necklace, earrings, whatever it is. And then if they want to
19 purchase that item, they would fill out what's called an MPU --
20 it's a little slip of paper that would have the item number on
21 it and sell price quantity. And they take that slip to the
22 cashier, and they pay for the goods. And they go to the MPU
23 cage to pick up the diamond.

24 If it's a one-of-a-kind item, that diamond would have
25 to be retrieved from that case and brought out to the

1 merchandise pickup to be placed in a box like this and get
2 their appraisal and inspect the item. And then what would
3 happen is that a supervisor would be there with the member,
4 make sure the member sees everything, and then sign off on that
5 purchase, to make sure that member understood exactly what they
6 were getting, that they were getting the right thing.

7 Q. You mentioned an appraisal that would come with this
8 specific item, the 639911 item?

9 A. Yes.

10 Q. Could I direct your attention to Defendant's Trial Exhibit
11 20, which is in the binder that I handed to you just a moment
12 ago.

13 A. Yes. Got it.

14 Q. Mr. Schutt, is this the type of appraisal that Costco
15 provided with diamond rings that were less than 1 carat in
16 weight at the time of this item in 2012?

17 A. Yes.

18 MR. DABNEY: Your Honor, we offer Defendant's Exhibit
19 20 in evidence.

20 MR. MITCHELL: No objection.

21 THE COURT: You said no objection?

22 MR. MITCHELL: No objection.

23 THE COURT: Defendant's Trial Exhibit 20 is admitted
24 in evidence and may be displayed.

25 (Defendant's Exhibit 20 received in evidence)

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1 MR. DABNEY: Thank you.

2 Q. So the document, as I understand it, if the person, if the
3 member is interested in possibly buying the diamond ring, they
4 would go to the, I think you called it the --

5 A. MPU cage, MPU pickup.

6 Q. -- merchandise pickup cage, and at that location, the
7 member would be provided with a beige box similar to Costco's
8 Exhibit 19, correct?

9 A. Yes.

10 Q. And they would also be provided with an appraisal that has
11 Costco Wholesale's name on it.

12 A. Yes.

13 Q. And was there anything in the appraisal that made mention
14 of Tiffany and Company?

15 A. No.

16 Q. Now, I would like to put up on the screen a photograph
17 that's been marked as Costco Trial Exhibit 2, which is the
18 photograph, an enlarged photograph of an item 639911 ring.

19 Mr. Schutt, is this in general a representation of the type of
20 ring that was identified by that sign, "platinum Tiffany .70 CT
21 VS2, I diamond ring"?

22 A. Yes.

23 Q. Now, there is a trademark stamped on the inside surface of
24 the diamond ring. Do you see that?

25 A. Yes.

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1 Q. Is that a legal requirement, that precious metals be
2 stamped with their manufacturer's trademark?

3 MR. MITCHELL: Objection.

4 A. Yes.

5 THE COURT: Please consult.

6 (Counsel confer)

7 MR. DABNEY: Your Honor, I'll rephrase.

8 Q. Mr. Schutt, do you know why that trademark is stamped on
9 there?

10 A. It's a legal requirement.

11 Q. Will Costco sell a diamond ring that does not have a
12 manufacturer's stamp?

13 A. No.

14 Q. Mr. Schutt, are you familiar with the vendor documentation
15 that Costco received for diamond rings similar to this?

16 A. Yes.

17 Q. Mr. Schutt, could I direct your attention to the document
18 that's been marked as Defendant's Trial Exhibit 27, which I
19 asked Mr. Kaczmarek about yesterday in his testimony. Were you
20 here for that testimony?

21 A. Yes.

22 Q. This is in evidence, so I'm just going to put it up on the
23 screen. Mr. Schutt, I'm going to put up on the screen a
24 document that's been marked as Costco Trial Exhibit 27, which
25 is dated 3 May 2012. Do you see where I'm referring to?

1 A. I see that, yes.

2 Q. There is a name Harjit Grewall. Do you know Harjit?

3 A. Yes, I do.

4 Q. Who is Harjit Grewall?

5 A. Harjit is a jewelry buyer for Costco wholesale.

6 Q. And then it identifies the vendor being R. B. Diamond Inc.
7 Is that correct?

8 A. Yes.

9 Q. So this is Costco's vendor. And then there is information
10 that includes an item description, and the item description
11 says "Tiffany ring 3/4 carat." Do you see where I'm referring
12 to?

13 A. I see, yes.

14 Q. Where does that information come from, Mr. Schutt?

15 A. That comes from the supplier of this particular item.

16 Q. And what do you understand the word "Tiffany" in this
17 vendor document is referring to?

18 A. I understand it to be referring to a setting style called
19 Tiffany.

20 Q. And does the image shown on the document depict an item
21 639911 diamond ring?

22 A. Yes.

23 Q. You understand the word "Tiffany" is describing the style
24 of the setting of that ring?

25 A. Yes.

1 Q. And at the time you wrote your letter and you said, the
2 sign was meant to say that the ring had a Tiffany-style pronged
3 setting holding the diamond, did you have in mind any different
4 meaning of "Tiffany" than what you understood the word
5 "Tiffany" in Defendant's trial 27 to be referring to?

6 A. No.

7 Q. Now, while we're on the subject, you were asked a series of
8 questions about Kirkland Signature.

9 A. Yes.

10 Q. Are you aware of any dictionaries in which the phrase
11 "Kirkland Signature" appears?

12 MR. MITCHELL: Objection, your Honor.

13 THE COURT: Please consult. And bear in mind that we
14 have about eight minutes to the lunch break.

15 (Counsel confer)

16 Q. Mr. Schutt, are you aware of any dictionaries in which the
17 phrase "Kirkland Signature" appears?

18 A. I'm not aware, no.

19 Q. Are you aware to your knowledge that the term "Kirkland
20 Signature" referred to some specific configuration of a
21 product?

22 A. No.

23 Q. You were asked about certain things like hearing aids and
24 eyeglasses and stuff. Does Kirkland Signature have any meaning
25 as describing a physical feature of eyeglasses?

1 A. No.

2 Q. Does Kirkland Signature have any meaning as describing a
3 physical feature of hearing aids?

4 A. No.

5 Q. Does Kirkland Signature have any meaning as describing a
6 physical picture of red wine?

7 A. No.

8 Q. Now, you referred on your direct testimony to certain terms
9 like "VS2" and "I." Do you recall that?

10 A. Yes.

11 Q. Do diamonds have a grading system?

12 A. Yes, they do.

13 Q. Is there any similar grading system for the type of
14 products that are private-label Kirkland Signature products?

15 A. I don't think so, no.

16 Q. So could I direct your attention now to the thing on the
17 lower left. There is a stamp on the lower left here. And I
18 wonder if you could explain to the members of the jury what
19 these figures in the lower left-hand side of Defendant's
20 Exhibit 27 are referring to.

21 A. OK. So it says "cost" there. So that would be the cost of
22 that diamond ring, including not only the cost of the diamond
23 and the setting but costs that would include the assembly of
24 the particular diamond ring. And those all add up to that
25 cost.

G9MATIF3ps

Schutt - cross

1 Q. And then you have -- so you show a cost of 2924.29?

2 A. Yes.

3 Q. And then a sell of 3299?

4 A. Yes. That would be our sell price on that particular item.

5 Q. And then it says "IMU." What does that stand for?

6 A. Yes. That's the initial markup. And that is the margin
7 percent on that item.

8 Q. And this is also showing another cost and another IMU. Do
9 you understand why there are two different costs and two
10 different IMUs?

11 A. Yes. The cost went down on this particular item. And that
12 IMU would be the new IMU if the sell price remain at 3299.

13 Q. Thank you, Mr. Schutt.

14 THE COURT: You have about three minutes, Mr. Dabney.

15 Q. Mr. Schutt, I think you testified on direct that the Costco
16 warehouses have jewelry displayed out in the open in the
17 warehouses. Is that fair to say?

18 A. Yes.

19 Q. So I heard opposing counsel used the word "caught" several
20 times. Was Costco ever trying to hide its jewelry from its
21 members?

22 A. No.

23 Q. Are you aware of any attempt to not let people know what
24 was being said about the rings in Costco's stores?

25 A. No.

1 Q. Now, you also talked about, I'd like to direct your
2 attention to the document plaintiffs referred to, Plaintiff's
3 Exhibit 19, in the plaintiff's book, the one that plaintiff
4 showed you. And this will be the last question before lunch.

5 A. Are you going to put that on the screen?

6 Q. I am.

7 A. OK.

8 Q. The plaintiffs showed you part of this exhibit, and I want
9 to show you another part, which is the "shop confidently." And
10 it says, "Membership: we will refund your membership fee in
11 full at any time if you are dissatisfied." Is that a fair
12 statement of the Costco policy with regard to people who buy
13 memberships?

14 A. Yes.

15 Q. And then it goes on to say that "merchandise: we guarantee
16 your satisfaction on every purchase we sell with a full
17 refund," with certain exceptions. Is that right?

18 A. Yes.

19 Q. Is there any time limit on that member satisfaction policy?

20 A. No.

21 Q. How important do you believe that return policy is to
22 Costco members?

23 A. It's extremely important.

24 Q. Because?

25 A. Extremely important because, our members buy with

1 confidence from us. And they know that we stand behind
2 everything that we sell. And if they're ever dissatisfied,
3 they can bring it back, and hopefully that leads to them
4 renewing their membership every year.

5 Q. Is there an element of trust in that relationship?

6 A. It's huge. Yes.

7 Q. And the members trust you and Costco trusts its members not
8 to abuse that?

9 A. Yes.

10 MR. DABNEY: Your Honor, if this is a good time to
11 stop. Thank you.

12 THE COURT: Yes. Thank you.

13 So, ladies and gentlemen, we'll now commence our
14 half-hour lunch break. Members of the jury, please be ready to
15 begin at 1 o'clock. Remember, don't discuss the case or
16 anything or anyone having anything to do with it. Enjoy your
17 lunch.

18 (Luncheon recess)

19 (Continued on next page)

G9MFTIF4

Schutt - cross

AFTERNOON SESSION

1:05 p.m.

(In open court; jury present)

THE COURT: Good afternoon, ladies and gentlemen.

Please take your seats in the jury box. And please be seated, everyone.

MR. DABNEY: Mr. Dabney, if you'd like to go to the podium. Just let the jurors get settled.

BY MR. DABNEY:

Q. Mr. Schutt, before the lunch break I was asking you about Costco membership. Do you recall that?

A. Yes.

Q. Is Costco membership renewal important to Costco?

A. Very important.

Q. Can you explain?

A. Well, our renewal rate is over 90 percent and having our members come back year after year and pay their membership fee is a very important part of our financial picture.

Q. Now, you also mentioned on direct that you had a code of ethics?

A. Yes.

Q. And you mentioned there were certain, there was a sequence of things that were part of that. Could you tell us what that is?

A. Certainly. Our code of ethics starts with obeying the law.

G9MFTIF4

Schutt - cross

1 That means you obey the law, the company, no matter what
2 country it's in, what business it's in, you obey the law first.

3 Next part of our code of ethics is to take care of our
4 members, provide them high-quality goods, lowest possible
5 prices, safe facilities, clean facilities. Next would be
6 taking care of our employees which would be, amongst other
7 things, paying high wages and giving good benefits to them.
8 Fourth would be respect our suppliers and we feel if you do all
9 four of those things in that order you will reward your
10 shareholders.

11 Q. I think you said -- how many employees does Costco have
12 today?

13 A. Well over 200,000. I don't recall the exact number.

14 Q. And approximately how many of those employees qualify for
15 health benefits?

16 A. I think somewhere in the 90 percentile qualify.

17 Q. And you said pay high wages, what did you mean by that?

18 A. We're known for paying the highest wages at retail in the
19 country.

20 Q. And do you know of any other retailer that has a return
21 policy that is similar to what Costco offers?

22 A. Nordstrom's would be one that would approximate Costco's
23 return policy, I think.

24 Q. Any others?

25 A. I can't think of one.

G9MFTIF4

Schutt - cross

1 Q. Now, Mr. Schutt, I think you testified on direct that prior
2 to December of 2012 you were not aware that any use of the word
3 Tiffany, Tiffany setting, Tiffany style, Tiffany set, no use of
4 the word Tiffany, you were not aware of any use of the word
5 Tiffany in Costco's jewelry case signs.

6 A. No.

7 Q. Is that correct?

8 A. Yes.

9 Q. So the first time you heard of that was when, sir?

10 A. After we were served a request from Tiffany and Company for
11 information.

12 Q. Was that in about December of 2012?

13 A. Yes.

14 Q. And what action did Costco take in response to the initial
15 communications with Tiffany?

16 A. We within days we removed any sign in any of our jewelry
17 cases that had the word Tiffany in them. We placed a block in
18 the system so that Tiffany could not be put on any sign in the
19 future.

20 Q. And did you respond to information requests from Tiffany
21 and Company that followed in the ensuing weeks?

22 A. Our company did.

23 Q. And were you here for the testimony of Ms. Abrams when she
24 was shown the letter from Mr. Levine which described, well, for
25 this time the sign said set in six prong Tiffany setting, and

G9MFTIF4

Schutt - cross

1 another time the sign said Tiffany set. Do you recall them?

2 A. Yes.

3 Q. Are you aware of any communication between Tiffany and
4 Company and Costco between January 31, 2013 and Valentine's day
5 of 2016?

6 A. No.

7 Q. As far as you know, the response to Mr. Levine's letter was
8 the complaint?

9 A. Yes.

10 Q. Now, Mr. Schutt, you mentioned a sign management issue on
11 your direct testimony.

12 A. Yes.

13 Q. I'd like to put up before you a document that's been in
14 evidence as Defendant's Exhibit 139 and I want to ask you, I
15 want to first draw your attention -- I'm just going to kind of
16 scroll down for the members of the jury so they can see all of
17 the different sign variations that are shown on the exhibit.
18 Do you see where I'm referring to, Mr. Schutt?

19 A. Yes.

20 Q. So sometimes it said .70 CT diamond solitaire set in six
21 prong Tiffany setting. Sometimes it said platinum .70 CT
22 Tiffany set. Do you see that?

23 A. Yes.

24 Q. And sometimes it said platinum .70 VS1 I-round Tiffany set
25 diamond ring. Do you see that?

G9MFTIF4

Schutt - cross

1 A. Yes, I do.

2 Q. Another variation. And then we come to the one that was
3 the subject of Ms. Popp's visit. Platinum Tiffany .70 CT VS2
4 I-round diamond ring. Then we come to the next one, which is
5 .70 CT VS2 I-round platinum diamond ring.

6 We have here over in the right fiscal year periods, do
7 you understand that?

8 A. Yes.

9 Q. Now, when you said that you changed the signage within a
10 few days of getting the communication from Tiffany, did that
11 include changing the text from what's shown on row four to row
12 five for item 639911 that we're looking at here?

13 A. Yes.

14 Q. And then if we go farther down we see for other items
15 different variations. For 637277 we had platinum Tiffany set
16 1.0 CT round diamond solitaire, and then three other
17 permutations.

18 Let me draw your attention to row seven and eight
19 where you have platinum Tiffany VS2 I-round diamond, then 1.0
20 CT platinum round. Then there's a change from 20133 to 20134.
21 Does that also refer to the same change that you referred to in
22 your direct testimony?

23 A. Yes.

24 Q. And I believe Mr. Kaczmarek testified to this, but could
25 you please remind the jury what the year and digit to the right

G9MFTIF4

Schutt - cross

1 of it refers to in Costco fiscal calendar?

2 A. So on the last, the last column under 637277, for example,
3 that would be 2013 period four.

4 Q. 2013 period four would be a fiscal year that started in
5 approximately August or September of 2012?

6 A. Yes.

7 Q. So 20134 would be a date like November 23, something?

8 A. Our period four is typically from the end of November to
9 the end of December.

10 Q. Mr. Schutt, can I direct your attention, I don't know
11 whether I have it in your binder or not. We'll get Mr. Hesketh
12 to explain the fiscal calendars.

13 So going back, looking at all these variation of
14 signs, do these sign variations illustrate what you referred to
15 as the sign management issue?

16 A. Yes.

17 Q. Now, at the time these signs were created, Mr. Schutt, what
18 was, who had responsibility for creating the signs?

19 A. The inventory control specialists.

20 Q. And did they work under the supervision of buyers?

21 A. Yes.

22 Q. At that time was there any management oversight above the
23 level of buyer over these signs? Do you know?

24 A. No.

25 Q. And as a result of the notice and investigation that you

G9MFTIF4

Schutt - cross

1 did -- strike that. Did your investigation of the
2 communications from Tiffany and Company about the signage lead
3 to your discovery of these variations?

4 A. Yes.

5 Q. What management change if any was put in to prevent a
6 recurrence of this?

7 A. Well, we now required a buyer to sign off on that sign
8 that's created by the ICS.

9 Q. So prior to this time was it within the ability of an ICS
10 to make a change and it would just go out on the floor without
11 any buyer actually personally reviewing the sign?

12 A. Yes.

13 Q. Mr. Schutt, have you seen an example of that in action in
14 this case, where an ICS was requested to make a change?

15 A. I have.

16 THE COURT: Please consult.

17 (Pause)

18 MR. MITCHELL: Sidebar, your Honor?

19 THE COURT: Yes.

20 MR. MITCHELL: Thank you.

21 (Continued on next page)

1 (At the side bar)

2 MR. MITCHELL: I asked Mr. Dabney for a proffer of
3 that question because I presumed he's referring to Mr. Karig.
4 Mr. Dabney made a proffer that he has seen Mr. Karig's e-mail,
5 but I don't think this is a witness, the chief of
6 merchandising, who can honestly say that he was aware of what
7 Karig was doing, because this is before the signage problem was
8 even brought to anyone's attention and this witness has already
9 said he didn't even know it was being used in signs. So I
10 think if he's going to offer the Karig e-mail or anything that
11 Karig did, that's in his case in chief through Karig, not
12 through this witness. Because it's clear this witness had
13 nothing to do with signs, didn't know about the signs and Karig
14 didn't report to him and he certainly didn't supervise Karig.

15 THE COURT: What is the basis of the proffer through
16 this witness?

17 MR. DABNEY: The sole purpose of this is to provide an
18 illustration of what the authority of ICSs was at the time.
19 He's testified that there now is a requirement of buyer signoff
20 on signage which is a management change from what existed in
21 2012. So the sole purpose of this is to illustrate what he
22 meant that at the time these signs were created somebody like
23 Karig could change a sign on his own and put it out on the
24 floor. Mr. Schutt obviously has no knowledge of these events
25 or what Karig was doing. What he's testified to is that there

G9MFTIF4

Schutt - cross

1 was a management change, a new requirement for buyer signoff
2 and this shows the old practice.

3 THE COURT: Well, I'm sure you'll both correct me if
4 I'm wrong, but my recollection of the Karig e-mail and
5 deposition testimony is that it referred specifically to the
6 inventory designation part of the computer screen rather than
7 specifically to the signage part of the computer screen, that
8 even Karig testified he wasn't sure what he did or if he
9 changed the signage. I said I would let it in as the basis for
10 arguments and inference, but arguments and inference are for
11 lawyers and to have this witness testify to an inference drawn
12 from this e-mail correspondence to which he wasn't a party and
13 of which he isn't aware is a bit too far of a stretch. So I
14 sustain the objection to use of the e-mail for that
15 illustrative purpose for this witness.

16 MR. DABNEY: Thank you, your Honor.

17 MR. MITCHELL: Thank you, your Honor.

18 (Continued on next page)
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G9MFTIF4

Schutt - cross

(In open court; jury present)

BY MR. DABNEY:

Q. So I believe I understood you to say, Mr. Schutt, that after you got the notice from Tiffany and Company a block was put in the Costco computer system so that you not only couldn't say Tiffany style ring, Tiffany style ring, but you couldn't put the word "Tiffany" in at all.

A. That's correct.

Q. At that time, Mr. Schutt, did you know that the plaintiffs in this case were making no claim as to use of "Tiffany style" on signage?

A. I didn't.

Q. At that time, were you aware that the plaintiffs were making no claim as to the use of "Tiffany setting" in signage?

A. No.

Q. At that time were you aware that the plaintiffs were making no claim to the use of "Tiffany set" in signage, that they were not making any claim as to that?

A. No.

Q. At the time were you aware that the plaintiffs were making no claim as to use of "round Tiffany set" in signage?

A. No.

Q. So you wrote a letter. You were asked on direct who you sent your letter to. Did someone on your team get tasked with trying to figure out who the letter should go to?

G9MFTIF4

Schutt - cross

1 A. Yes.

2 Q. And what was the name of that person; do you remember?

3 A. Peter Hesketh.

4 Q. And do you know of your own knowledge what criteria

5 Mr. Hesketh used in order to generate the mailing list for your
6 letter?

7 A. Yes.

8 Q. And what was that criteria?

9 A. It was any sign in our jewelry case that had the word
10 Tiffany in it, Tiffany set, Tiffany setting, Tiffany style.
11 Anything that had "Tiffany" in it. Any diamond that had a
12 "Tiffany" in it.

13 Q. So that means you sent a letter to someone who bought a
14 diamond ring in 2006 where the sign had a description on it as
15 to which the plaintiffs were not even making a claim?

16 A. Yes.

17 Q. Now, you were asked at your deposition how many of the
18 letters you sent. Do you recall that?

19 A. Yes.

20 Q. At the time of your deposition did you have the mailing?

21 A. I didn't have it in my personal possession, no.

22 Q. Have you since seen the mailing list for your letter?

23 A. I have.

24 Q. And how many names, approximately, were on the list?

25 A. 2500.

G9MFTIF4

Schutt - cross

1 Q. And that 2500 included sales that coincided with times
2 where the sign said Tiffany setting, correct?

3 A. Yes.

4 Q. And Tiffany set?

5 A. Yes.

6 Q. And round Tiffany set?

7 A. Yes.

8 Q. And, Mr. Schutt, you understand, I believe, that one of the
9 issues in this case has to do with the sign on row 5 of
10 Defendant's Exhibit -- sorry, row 6 of Defendant's Exhibit 139
11 where it says "Tiffany" on the first line and then "set" at the
12 beginning of the second line?

13 A. Yes.

14 Q. Did you understand that sign to have any different meaning
15 than, say, the line on row 3?

16 A. No.

17 Q. What did you understand the word "Tiffany" to mean in
18 signage that took the form of row 6 of Defendant's Exhibit 139?

19 A. It would be describing the setting for that particular
20 diamond ring, Tiffany setting.

21 Q. "Tiffany set" was an abbreviation for Tiffany setting?

22 A. Yes.

23 Q. Now, you were also asked on direct about whether from time
24 to time Costco actually sold Tiffany and Company branded
25 products. Do you recall that?

G9MFTIF4

Schutt - cross

1 A. Yes.

2 Q. And has Costco from time to time told Tiffany and Company
3 branded products?

4 A. Yes.

5 Q. And when Costco has sold Tiffany and Company branded
6 products have they been delivered to customers in beige boxes
7 like this?

8 A. No.

9 Q. This, referring to Costco Exhibit 19. When Costco has, had
10 Tiffany and Company branded products, has it used the factory
11 packaging that comes with those products?

12 A. Yes.

13 Q. Mr. Schutt, could I direct your attention to the document
14 in the plaintiff's book that was given to you, the very first
15 item in the book. Do you have it in front of you?

16 A. Yes. I do.

17 Q. Are you able to identify what this is, Mr. Schutt?

18 A. These are sunglasses with the Tiffany and Company brand on
19 them.

20 Q. And do you recognize this as a display from inside a Costco
21 warehouse store?

22 A. Yes.

23 MR. DABNEY: Your Honor, we offer Defendant's Trial
24 Exhibit 58 in evidence.

25 THE COURT: Any objection?

G9MFTIF4

Schutt - cross

1 MR. MITCHELL: No objection.

2 THE COURT: Defendant's Exhibit 58 is admitted in
3 evidence.

4 (Defendant's Exhibit 58 received in evidence)

5 Q. Mr. Schutt, I'm going to put up on the screen -- zoom out a
6 little bit, so you can see what we're looking at here. Can you
7 explain, Mr. Schutt, how this display of Tiffany and Company
8 branded goods differs from the way Costco displays fine
9 jewelry?

10 A. Well, sure. This display here shows the manufacturer's box
11 that comes with this particular item. This sign is consistent
12 with our protocol, where you have the brand of these particular
13 items on the first line of those signs. That's generally it.

14 Q. So is it fair to say that when Costco has Tiffany and
15 Company branded goods it uses the blue box in order to mark it?

16 A. Yes.

17 Q. And is the blue box an important aspect of the Tiffany and
18 Company branding as you understand it?

19 A. Yes.

20 Q. Now, Mr. Schutt, if I could direct your attention to
21 another photograph that's in the book that I handed you which
22 has been marked as Exhibit 59, and I ask you to take a look at
23 that photograph.

24 A. Yes.

25 Q. Could you tell us what this is?

G9MFTIF4

Schutt - cross

1 A. This is, and it's not on my screen here, but this is a
2 picture of the majors area of our location, one of our
3 locations, and more specifically in the center would be our
4 jewelry case for that location.

5 Q. Does this photograph illustrate the general type of store
6 layout that Mr. Mitchell asked you about on direct examination?

7 A. Yes.

8 MR. DABNEY: Your Honor, we offer Exhibit 59 in
9 evidence?

10 MR. MITCHELL: No objection.

11 THE COURT: Defendant's Exhibit 59 is admitted and may
12 be displayed.

13 MR. DABNEY: Thank you.

14 (Defendant's Exhibit 59 received in evidence)

15 Q. So, Mr. Schutt, I'm going to put up on the screen this
16 scene. Could you tell us what we're looking at here?

17 A. Well you're looking at the jewelry case at a Costco
18 location.

19 Q. So if we look at -- I notice that there's some cases down
20 on the first level that appear to have yellow light in them.
21 Can you tell me what is in the cases that are in the lower part
22 that I'm calling out that has the yellow light?

23 A. That would be where our gems and higher end -- our diamonds
24 and gems would be displayed.

25 Q. And this is where in this part of the case this would be

G9MFTIF4

Schutt - cross

1 where the diamond rings at issue in this case would have been
2 presented for display?

3 A. Yes.

4 Q. Now, does Costco sell any branded fine jewelry in the
5 United States?

6 A. We don't sell branded gems in the United States. We sell
7 branded watches, for example, which would be considered
8 jewelry, yes.

9 Q. But talking about necklaces, engagement rings, broaches,
10 bracelets, does Costco sell branded jewelry in this part of the
11 display case?

12 A. No.

13 Q. So if someone is looking down in this part of the case
14 where the diamond rings are, they're not going to see anything
15 that Costco intended to be a branding, is it fair to say?

16 A. Yes.

17 Q. And if you look down in this part of the jewelry case
18 you're not going to see any factory packaging, are you?

19 A. No, you are not.

20 Q. In fact, you see some of what look like wood boxes in this
21 end of the case. Do you see what I'm referring to?

22 A. Yes.

23 Q. Are those boxes similar to the ones in Defendant's Exhibit
24 19?

25 A. Yes, they are.

G9MFTIF4

Schutt - cross

1 Q. So the only packaging that would be in the display case if
2 there was any packaging where the diamond rings are offered is
3 packaging like Defendant's Exhibit 19, is that right?

4 A. Yes, that's correct.

5 Q. You wouldn't ever see packaging like the blue box for
6 Tiffany, would you?

7 A. No.

8 Q. Then Mr. Mitchell asked you a series of questions about
9 Rolex watches and so on. Do you recall those questions?

10 A. Yes.

11 Q. Would such products be disclosed in this upper part of the
12 case up here?

13 A. Yes, they would.

14 Q. And would they be displayed in their original factory
15 package?

16 A. Yes, they would.

17 Q. And would their branding be the first word of any signage
18 that shows up here?

19 A. Yes, they would.

20 Q. Now, Mr. Schutt, I'd like to direct your attention to a
21 photograph that is marked and you can go back to my book, it's
22 Exhibit 71. Mr. Schutt, could I ask you if you recognize what
23 we're looking at in Defendant's Exhibit 71?

24 A. Yes, this would be a prototypical display for our diamonds
25 in our jewelry case.

G9MFTIF4

Schutt - cross

1 Q. Does Defendant's Exhibit 71 provide an illustration of how
2 diamond jewelry is displayed in the part of the case that we're
3 looking at in Defendant's Exhibit 59?

4 A. Yes, it would.

5 THE COURT: Your Honor, we offer defendant's Trial
6 Exhibit 71 in evidence.

7 MR. MITCHELL: May I have a brief voir dire of this
8 exhibit?

9 THE COURT: Would you discuss with Mr. Dabney what
10 your issue is?

11 (Pause)

12 THE COURT: Look at me, jury.

13 MR. DABNEY: Could we have a sidebar, your Honor?

14 (Continued on next page)

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G9MFTIF4

Schutt - cross

1 (At the side bar)

2 MR. DABNEY: Mr. Mitchell --

3 MR. MITCHELL: I asked if I could have a brief voir
4 dire and Mr. Dabney said "maybe," then "no." I don't know. I
5 thought you wanted to ask the question. You want me to
6 raise -- okay, fine.

7 I don't know the source of this photograph and I don't
8 know whether it was staged or not. I don't know if this
9 witness knows so I want to know whether this is, and the person
10 who took the photos was a photographer, apparently, our concern
11 with this, with respect to introduction of the document in the
12 exhibit list is that it's a staged photograph. I don't think
13 he's offering it through this witness, at least I have a right
14 to ask before I make a decision what his knowledge is, I'd like
15 to find out what his knowledge is with respect to the photo.

16 THE COURT: I hear what you're saying. Do you plan to
17 ask any foundational questions?

18 MR. DABNEY: He's testified this is a prototypical
19 display in Costco warehouse stores of which there are hundreds.
20 That's all he knows.

21 THE COURT: Well, I'm not even sure what
22 "prototypical" means in this context, so if you want to, if
23 you're not planning to ask him, you want to voir dire as to
24 whether this is an accurate representation of a typical actual
25 display in the store or different, I'll let you voir dire on

G9MFTIF4

Schutt - cross

1 that, if you're not planning to make that foundation.

2 MR. DABNEY: I can ask him that, sure.

3 MR. MITCHELL: I want to find out whether he knows
4 whether or not this was set up for this photograph or whether
5 this was an actual display in use in the store at a particular
6 time.

7 THE COURT: You can ask him that on cross. If he
8 establishes through this witness that this is a fair and
9 accurate representation according to the witness of a typical
10 display in an actual store I'll let him go forward.

11 MR. DABNEY: Okay, thank you.

12 MR. MITCHELL: Thank you.

13 (Continued on next page)

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1 (In open court; jury present)

2 BY MR. DABNEY:

3 Q. Mr. Schutt, is the photograph Defendant's Exhibit 71 a fair
4 and accurate representation of a typical fine jewelry display
5 of the type depicted in Costco Trial Exhibit 59?

6 A. Yes.

7 MR. DABNEY: Your Honor, we offer Defendant's Trial
8 Exhibit 71 in evidence.

9 MR. MITCHELL: No objection.

10 THE COURT: Defendant's Exhibit 71 is admitted and may
11 be displayed.

12 (Defendant's Exhibit 71 received in evidence)

13 Q. So, Mr. Schutt, supposing you're standing in the foreground
14 of this photograph and you walked up to the case where you see
15 these wooden boxes there and you looked down in it.

16 A. Yes.

17 Q. Does Defendant's Exhibit 71 depict what you would see?

18 A. Yes.

19 Q. All right, so I'm going to put this up on the screen.

20 So are you able to just tell us what we're looking at
21 and comment on anything you believe the jury should know?

22 A. Well, sure. We're looking at the right side, I believe, of
23 a jewelry case and I know that because our standard is we put
24 in the middle of the jewelry case our highest end diamond items
25 that we have in our warehouse at that time, and we put them in

G9MFTIF4

Schutt - cross

1 the brown box that you've seen and then the other items are
2 merchandised around those.

3 Q. So the tags here would all have information that describes
4 features of the ring?

5 A. Yes.

6 Q. So they might provide the metal type?

7 A. Yes.

8 Q. And the clarity, like VS2I, or VS2?

9 A. Yes.

10 Q. The color and the carat weight and the other information?

11 A. Yes.

12 Q. But you would not see any brand names down in this part of
13 the case?

14 A. No.

15 Q. So, Mr. Schutt, even today if someone had bought a diamond
16 ring in a Costco store before December 16, 2012, if that person
17 was dissatisfied they could return it to Costco and get a
18 refund?

19 A. Absolutely.

20 Q. And you were here when I showed Mr. Kaczmarek the buyer
21 list that was provided to plaintiff's counsel?

22 A. I was.

23 Q. And you recall when I also gave it to Ms. Abrams?

24 A. Yes.

25 Q. And the people on that list, if any of them misunderstood

G9MFTIF4

Schutt - redirect

1 the signs or even if they didn't, they could come and get a
2 refund from Costco for the full amount?

3 A. For any reason.

4 Q. Now, in some of the -- in one of the cases, Mr. Schutt, if
5 someone had taken you up on your offer, was the price that they
6 paid more than what the item was selling for at the time? If
7 you recall.

8 A. Yes, it could have been, sure.

9 Q. So even if the price of diamonds had gone down between the
10 time of purchase and the time they came in for a refund, they
11 could still get what they paid back?

12 A. Yes.

13 MR. DABNEY: Your Honor, I have no further questions.

14 THE COURT: Any redirect?

15 MR. MITCHELL: Yes, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. MITCHELL:

18 Q. Mr. Schutt, just so I understand that policy that you just
19 discussed, this lifetime return policy would apply to people
20 who had bought rings even before the statute of limitations
21 period, correct?

22 A. Yes.

23 Q. So you could have bought your ring in 2000 by the time you
24 sent your letter in April of 2013, right?

25 A. Yes.

G9MFTIF4

Schutt - redirect

1 Q. And we would know that from April 2000 to April of 2013,
2 using that as an example, the price of gold and the price of
3 diamonds went up, right?

4 A. I think so.

5 Q. Things usually go up in price, not down. I know within
6 short periods there could be fluctuations but in the long term
7 prices generally go up, right?

8 A. Yes.

9 Q. Your policy, though, was to give people their money back,
10 right?

11 A. Yes.

12 Q. So you were writing to people who bought engagement rings.
13 You agree with me engagement rings is a pretty important gift
14 that people give to people in their lifetime?

15 A. Yes.

16 Q. And for those married, I'm sure when someone gives a ring
17 to a significant other to get engaged, that becomes a
18 sentimental act, right?

19 A. Yes.

20 Q. So even if you bought the ring, gave the ring, received the
21 ring thinking it was a Tiffany ring, if you've had it as an
22 engagement ring for a number of years you might not return it,
23 right?

24 A. You had ability to do that.

25 Q. But it's not like, this is not like a vacuum cleaner. This

G9MFTIF4

Schutt - redirect

1 is an engagement ring we're talking about. So you're
2 suggesting what we need is, you either need people who are so
3 annoyed or are no longer married or some other reason that
4 they'd be willing to part with their engagement ring in
5 response to your offer. That's right, isn't it?

6 A. Yes.

7 Q. Okay. Now, for somebody who is that angry and wants to
8 bring the ring back, your offer essentially was no matter what
9 the price of gold and diamonds is today, we'll give you your
10 money back at the price you paid for it in the past, right?

11 A. Yes.

12 Q. So for people who actually thought they had a Tiffany
13 engagement ring and found out they did not, their choice was to
14 return the ring to you, get the discounted Costco price back
15 and then go over to Tiffany and buy the same ring for a lot
16 more money, right?

17 MR. DABNEY: Please consult. Please stand closer
18 together and talk quieter. Thank you.

19 (Pause)

20 MR. MITCHELL: I'll rephrase the question.

21 Q. Assume, Mr. Schutt, that one of your customers read your
22 letter, read between the lines of your letter and understood
23 you to be saying your sign may have said Tiffany but it wasn't,
24 it was made by us at Costco. Even though you didn't say that,
25 but they interpreted it that way. And were upset. Because

G9MFTIF4

Schutt - redirect

1 that person thought they had a Tiffany ring. Can you envision
2 that kind of Costco purchaser?

3 A. It's a little far-fetched, but yes, I could see that.

4 Q. Okay. So we know for sure that that person is not going to
5 go back to Costco and buy another Costco ring, right?

6 A. No.

7 Q. Right? You don't know that for sure?

8 A. I can't assume that they will not buy another Costco ring,
9 no.

10 Q. Why would they return an engagement ring at Costco and get
11 the money back for what they paid for it years ago when it
12 would cost them more even at Costco to buy the same ring today?

13 A. Actually, there are situations where the diamond, or the
14 ring could cost less and a member could come back and get a
15 full refund for what they paid and if that same item was being
16 sold for less they could buy it for less and pocket that
17 difference for what they paid.

18 Q. That's what you expected to happen in response to your
19 letter?

20 A. I didn't know.

21 Q. Okay, I didn't think so. So why did you -- there's no
22 reason to make that speech if you didn't think it was going to
23 happen, you just answer yes or no.

24 A. Because I didn't know.

25 Q. Mr. Dabney marked this appraisal for a ring. By the way,

G9MFTIF4

Schutt - redirect

1 do you see this date now is 2/4/13, do you see the date, right
2 around the time the lawsuit was filed?

3 A. Yes.

4 Q. And the appraised amount now has gone up even in your
5 appraisal from the 4850 that was in the ring that Tiffany
6 bought that had been appraised in April of 2012, now you've
7 raised the number to another amount. Do you see that?

8 A. I see that the price is 4525 estimated retail value.

9 Q. So even Costco thinks in that period from somewhere between
10 April of 2012 and February of 2013 the price went up?

11 A. This appraisal is the appraisal for that diamond ring that
12 was bought at that time.

13 Q. Focus on the question --

14 A. That exact ring.

15 Q. Are you finished?

16 A. That exact ring.

17 Q. Say again?

18 A. That appraisal would be an appraisal for a specific ring.

19 Q. Maybe I can refresh your recollection. If you don't know
20 we'll hear it later, but aren't these ring appraisals for a
21 class of ring, not that specific ring in the photograph? It's
22 for all rings. It's not your specific ring. That's how your
23 appraisals are, right?

24 A. I think our appraisals are, if I remember correctly, for
25 that specific ring in that particular, that particular ring.

G9MFTIF4

Schutt - redirect

1 Q. So you think that is the actual ring that you're getting
2 and not all 639911 rings; that's your testimony? You don't
3 even know? Are you sure or you're not sure?

4 A. I'm pretty sure, yeah.

5 Q. You're pretty sure. Lisa Switzer, though, is the person
6 who does the appraisals?

7 A. She's one of them.

8 Q. So if Lisa Switzer testified the appraisal was for the
9 class of ring not the ring in particular, you wouldn't have
10 anything to contradict that, correct?

11 A. I don't know what her testimony is, no.

12 Q. But you don't have any specific evidence contrary to that?

13 A. No.

14 Q. So focusing on the amount in this one which is 4,525 let's
15 assume this ring was sold for \$3,299. Were you offering your
16 members at least a recovery of the appraised value that you
17 gave them of the ring so that they could go somewhere else and
18 buy a comparable ring that was really worth that?

19 A. No. Our refund policy was that they could receive back
20 what they paid for the ring.

21 Q. Just what they paid for the ring?

22 A. Yes.

23 Q. So you told them when they bought the ring that they got
24 this great deal by delivering an appraisal that appraises the
25 amount of the ring for more than a thousand dollars more than

G9MFTIF4

Schutt - redirect

1 what they paid for it, but when you offered to give them their
2 money back knowing it's a engagement ring and if they're still
3 married they have to replace it, you didn't give them the
4 replacement cost, did you? You weren't offering that, were
5 you?

6 A. No, we offered what they paid for the ring.

7 Q. And your expectation would be that anyone who has an
8 engagement ring who is still married and is angry enough to
9 return the ring would go off and have to buy another engagement
10 ring, right?

11 A. I don't know if they'd go off. They might buy another one
12 from Costco.

13 Q. If they're angry at you for misrepresenting the ring to
14 them why would they come back to Costco and buy another ring
15 from them. Doesn't make much sense, does it?

16 A. Oh, okay.

17 Q. Did you give any consideration to perhaps changing your
18 return policy a little bit in this circumstance because you
19 might be dealing with people who were upset and were going to
20 go and replace their rings, maybe we should give them the
21 appraised value of the ring?

22 A. No.

23 Q. Didn't give that any thought?

24 A. No.

25 Q. Okay.

G9MFTIF4

Schutt - redirect

1 THE COURT: We have ten minutes till the end of the
2 day.

3 MR. MITCHELL: Thank you.

4 Q. Let me show you what Mr. Dabney marked Defendant's Exhibit
5 71. This was the photo of the rings in the case. Now, you saw
6 the photos that Ms. Popp took, correct?

7 A. Yes.

8 Q. And the photos that Ms. Popp took showed that the rings
9 that she saw with "Tiffany" in the signage were in those
10 holders, right?

11 A. Yes.

12 Q. Okay. The boxes over here were not where the ring that had
13 the Tiffany sign next to it were displayed, correct?

14 A. Best of my recollection, no.

15 Q. And the rings here that we're talking about were
16 approximately \$3,200 when they were observed and a little over
17 \$6,000, right?

18 A. Yes.

19 Q. So if you look here you'll see that you have a \$7,200 ring
20 that's not in the box, right?

21 A. Yes.

22 Q. And you have a \$5,000 ring that's not in a box?

23 A. Yes.

24 Q. What's in the box is a \$16,000 ring and a \$12,000 ring,
25 right?

G9MFTIF4

Schutt - redirect

1 A. Yes.

2 Q. You said this is a typical display at a Costco, right?

3 A. Yes.

4 Q. And the middle part where the expensive rings are?

5 A. Yes.

6 Q. So the rings that had the sign "Tiffany" next to them were
7 not displayed in a Costco box, right?

8 A. Not to my knowledge.

9 Q. Mr. Dabney showed you a vendor quote sheet from the company
10 RB Diamond, I believe.

11 A. Yes.

12 Q. I want to make sure I understand Costco's corporate
13 position here about taking responsibility. Okay? Here's the
14 diamond. RB Diamond, 22 West 48th Street, New York.

15 A. Yes.

16 Q. Which for most New Yorkers is the diamond district, right?

17 A. Yes.

18 Q. So RB Diamond is a diamond or jewelry dealer on 48th
19 Street, right?

20 A. Yes.

21 Q. To the extent they even manufacture anything there this is
22 a relatively small company. There are thousands of jewelry
23 dealers and wholesalers there on 48th Street in New York.

24 You're aware of that?

25 A. I am not.

G9MFTIF4

Schutt - redirect

1 Q. You're not. Costco, you said, you corrected me when I said
2 \$100 billion, does 120 billion a year in sales, correct?

3 A. Yes.

4 Q. And your corporate position is, if I understand you
5 correctly, a little company on 22 West 48th Street, New York,
6 is responsible for Tiffany being in the signage of Costco. Do
7 I understand you correctly? Their fault?

8 A. No.

9 Q. It was not their fault?

10 A. No.

11 Q. Whose fault is it?

12 A. It is essentially my responsibility for the actions of our
13 ICSs that take the information directly from our supplier's
14 sheets and abbreviate it and put it on to our signs.

15 Q. It's your fault because the jewelry people --

16 A. We rely on people to give us accurate information.

17 Q. Let me be clear I understand what you're saying. It's your
18 fault, and ICS -- that's an entry level position at Costco in
19 terms of the corporate headquarters, it's like an entry level
20 position, right?

21 A. Yes.

22 Q. You could be promoted from working in one of the warehouses
23 if you get promoted to headquarters, an entry level position is
24 ICS, correct?

25 A. Yes.

G9MFTIF4

Schutt - redirect

1 Q. So you're saying in taking responsibility it's my
2 responsibility that the most junior person at Costco was given
3 the responsibility to use trademarks in signage without any
4 supervision whatsoever. You're taking responsibility for that?

5 A. Yes.

6 Q. Okay. And we're not going to hear, then, that Costco is
7 taking the position that RB Diamonds is responsible for what
8 appeared in Costco signage. You're much bigger than they are,
9 you should know what you're doing, right?

10 A. We take the information directly off the vendor quote
11 sheet.

12 Q. That sounds like you're blaming RB Diamonds. So let me be
13 clear. Is Costco, a \$120 billion a year company, taking
14 responsibility for what the signs say in its own stores?

15 A. We're responsible for and I am responsible for the signs
16 for products sold at our Costco locations.

17 Q. Right, it's not RB Diamond's fault when it winds up on the
18 floor at Costco?

19 A. They are the supplier for us and they provide information
20 for us to create our signs from.

21 Q. That sounds like a non-answer answer. I want to get an
22 answer answer. Okay? RB Diamonds is not responsible for the
23 language of signs on the floors of Costco around the world, is
24 it?

25 A. They are responsible for providing us accurate information

G9MFTIF4

Schutt - redirect

1 on their quote sheets.

2 Q. So the level of your corporate oversight at the time these
3 signs were made was such that a little store or a little
4 vendor, a little dealer on 48th Street could cause signs all
5 over the world at Costco to say "Tiffany". That's what your
6 testimony is?

7 A. If that's what they put on their quote sheet and we took it
8 from their quote sheet, that would be accurate.

9 Q. Do you think that sounds frightening when you say that?

10 A. Could you clarify that question for me?

11 Q. Yeah, because I'm representing a company that has one of
12 the most famous trademarks in the world and what you're saying
13 is that Tiffany ends up on the floor of a Costco all over the
14 world because somebody at a small vendor in New York used the
15 word "Tiffany" in a sheet. Seems like you're blaming somebody
16 else. It sounds like a kid saying, "He did it, she did it, but
17 it's not my fault." That's what it sounds like to me.

18 A. Okay.

19 Q. Doesn't sound like that to you?

20 A. No.

21 Q. Do you remember at your deposition I asked you about the
22 use of "Tiffany" in signage and you said that it was something
23 you didn't even need to do, you didn't need to use the word
24 "Tiffany" to describe these rings, you could just see it with
25 your eyes and know what the setting was?

G9MFTIF4

Schutt - redirect

1 A. Yes.

2 Q. Okay. So you said in answer to Mr. Dabney's question you
3 needed to use the word "Tiffany" to describe the style of the
4 ring. That's not true. You don't really mean that, right?

5 A. No, I meant it. I told you in my deposition that it wasn't
6 necessary for us to be successful in selling diamonds.

7 Q. From page 33 of your deposition. We were talking about
8 certain market -- gray market goods. I'll read this. If you
9 need me to read the whole thing, I will. This is a sentence,
10 it starts at line ten, page 34, line 10.

11 "If you looked at the prongs, you know, the generic-
12 looking Tiffany setting, it's not necessary in my view, in my
13 opinion --"

14 I'm sorry, one step up. It says, "The Tiffany
15 description of the setting would speak for itself. If you
16 looked at the prongs, you know, the generic-looking Tiffany
17 setting, it's not necessary in my view, in my opinion."

18 So you're saying in your deposition you don't need to
19 use the word "Tiffany" to describe the ring? That's what
20 you're saying?

21 A. It's not a hundred percent necessary, no.

22 Q. Okay.

23 THE COURT: Two minutes.

24 MR. MITCHELL: Thank you.

25 Q. In the -- I don't need to put it up again. You

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Schutt - redirect

1 acknowledged in answer to questions to me that part of taking
2 responsibility was that you accept that this Court has found
3 that "Tiffany" standing alone is a valid trademark, right?
4 That was part of what you said you accept responsibility for,
5 correct?

6 A. Yes.

7 Q. Okay. And that Tiffany is not generic, right?

8 A. Tiffany on its own is not generic.

9 MR. MITCHELL: Right, okay. Mr. Cole, could you
10 please put up, this will be the last thing. 20, is it? 25,
11 PTX25. Is that the photograph of the sign? Just zoom in on
12 that.

13 Q. You would agree with me, would you not, that that
14 constitutes a standalone use of Tiffany?

15 A. Yes.

16 Q. And you would agree with me, would you not, that Tiffany in
17 that sign is used as a brand, correct?

18 A. No.

19 Q. You would not agree with that?

20 A. No.

21 Q. I thought you took responsibility for it.

22 A. I do.

23 Q. Could you tell me any other name and any other word in that
24 sign that is a brand other than the word "Tiffany"?

25 A. This sign refers to a setting for this diamond, a Tiffany

G9MFTIF4

Schutt - redirect

1 setting, yes.

2 Q. If you're a customer, can you tell me any other word that a
3 customer would look through the glass and look at and see in
4 that sign that they would consider a brand?

5 A. They may think platinum is a brand because it's the first
6 word on that first line. They could think that.

7 Q. That's your testimony?

8 A. Yes.

9 Q. That platinum might be a brand for somebody who walks in
10 the store?

11 A. It could be.

12 Q. You don't think the first word they might think is a brand
13 in that sign is the word "Tiffany"? No?

14 A. I can't speak for every member that saw it, but that sign
15 refers to a Tiffany setting.

16 MR. MITCHELL: No further questions, your Honor.

17 THE COURT: Thank you, Mr. Mitchell.

18 Ladies and gentlemen, this concludes our presentation
19 of evidence for the week. Thank you for your work with us this
20 week. We will resume on Monday morning, the 26th, at 9:15. So
21 please be ready in the jury room for 9:15 on Monday. I remind
22 you that you must not discuss the case or anything or anyone
23 having anything to do with it in any way among yourselves or
24 with any other person, directly, electronically or by any other
25 means. You must leave your notes in the jury room in the

G9MFTIF4

Schutt - redirect

1 envelopes provided and, as I said, please be back ready on
2 Monday for 9:15. We hope that you have a good relaxing weekend
3 and safe travels if you're going anywhere. We look forward to
4 seeing you on Monday.

5 (Jurors exit)

6 (Continued on next page)

G9MFTIF4

Schutt - redirect

1 (In open court; jury not present)

2 THE COURT: Mr. Schutt, since you're still on
3 examination do you understand that you are not to discuss with
4 anybody the subject matter of your testimony?

5 MR. DABNEY: Your Honor, I understood that Mr.
6 Mitchell had concluded his examination. He said he had no
7 further questions.

8 THE COURT: Oh, you're done, then?

9 MR. MITCHELL: I am concluded unless Mr. Dabney has
10 redirect.

11 MR. DABNEY: I do not expect to have redirect.

12 THE COURT: I'm sorry, I just thought you meant for
13 today. Therefore, Mr. Schutt, your testimony is concluded.
14 Anyway, sorry for that misunderstanding. I look forward to any
15 submissions in connection with the charge conference to get to
16 my chambers by noon tomorrow, which I believe is the deadline
17 and to see you all on Monday morning at 9:00. Mr. Mitchell?

18 MR. MITCHELL: As a question. If I understood your
19 Honor correctly yesterday, because when we originally submitted
20 proposed jury charges we provided cases, we provided law to the
21 Court and the Court has since reviewed those, researched the
22 issues I'm sure, itself and come up with jury charges. If I
23 understood the Court correctly those types of submissions that
24 the Court has are not to be rehashed, we're not going to do
25 those again?

1 THE COURT: Correct.

2 MR. MITCHELL: So if something that was not part of
3 the original submission process concerning how we would want
4 the jury to be charged that we've already given you cases or
5 given you legal arguments about why we were right or the other
6 side wasn't right, we're not to do that again?

7 THE COURT: Please, please don't.

8 MR. MITCHELL: Thank you.

9 THE COURT: All right, everything clear? Great, thank
10 you. As Ms. Ng will tell you, I need the tables tomorrow, so
11 please do tidy up and try to get some relaxation on your
12 weekend. We'll see you all Monday.

13 (Adjourned to September 26, 2016 at 9:00 a.m.)
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